2016

Rashell Quast v. Utah Labor Commission, University of Utah Huntsman Cancer Hospital and/or Workers Compensation Fund of Utah : Brief of Appellee

Utah Supreme Court

IN THE UTAH SUPREME COURT

RASHELL QUAST,

Petitioner,

v.

UTAH LABOR COMMISSION, UNIVERSITY OF UTAH HUNTSMAN CANCER HOSPITAL and/or WORKERS COMPENSATION FUND OF UTAH,

Respondents.

APPELLEE'S BRIEF

Appellate Case No. 20151041

BRIEF OF APPELLEE

Brief of Appellee/Respondent on Certiorari
to the Utah Court of Appeals

Hans M. Scheffler
WORKERS COMP. FUND OF UTAH
100 West Towne Ridge Parkway
Sandy, UT 84070
hscheffl@wcfgroup.com
Attorney for Appellant Univ. Of Utah

Jaceson Maughn
UTAH LABOR COMMISSION
160 East 300 South, 3rd Floor
P.O. Box 14660
Salt Lake City, UT 84114-6600
Attorney for Labor Comm. of Utah

Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH ROBSON ATTORNEYS
1996 East 6400 South Suite 100
Salt Lake City, Utah 84141
dan@bertchrobson.com
kevin@bertchrobson.com
Attorneys for Appellee

IN THE UTAH SUPREME COURT

RASHELL QUAST,

Petitioner,

v.

UTAH LABOR COMMISSION, UNIVERSITY OF UTAH HUNTSMAN CANCER HOSPITAL and/or WORKERS COMPENSATION FUND OF UTAH,

Respondents.

APPELLEE'S BRIEF

Appellate Case No. 20151041

BRIEF OF APPELLEE

Brief of Appellee/Respondent on Certiorari
to the Utah Court of Appeals

Hans M. Scheffler
WORKERS COMP. FUND OF UTAH
100 West Towne Ridge Parkway
Sandy, UT 84070
hscheffl@wcfgroup.com
Attorney for Appellant Univ. Of Utah

Jaceson Maughn
UTAH LABOR COMMISSION
160 East 300 South, 3rd Floor
P.O. Box 14660
Salt Lake City, UT 84114-6600
Attorney for Labor Comm. of Utah

Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH ROBSON ATTORNEYS
1996 East 6400 South Suite 100
Salt Lake City, Utah 84141
dan@bertchrobson.com
kevin@bertchrobson.com
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code §78A-4-103(a)(2009).

STANDARD OF REVIEW

Quast's petition for review argued that he Commission improperly construed the PTD statute, a question of law. (Quast prevailed at the Commission on factual questions.) The standard of review is correctness for statutory construction. *Provo City v. Serrano*, 2015 UT 32, ¶9; 345 P.3d 1242, 1247.

DETERMINATIVE AUTHORITIES

The determinative statutes in this case are:

Utah Code §34A-2-413(1)(c)(i)-(iv)(2006):

> (c) To establish that an employee is permanently totally disabled the employee must prove by a preponderance of the evidence that:
>
> (i) the employee is not gainfully employed;
>
> (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
>
> (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and
>
> (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's:
>
> (A) age;
>
> (B) education;
>
> (C) past work experience;
>
> (D) medical capacity; and

(E) residual functional capacity.

Utah Code §34A-2-413(1)(b)(iii)(2006):

(b) To establish entitlement to permanent total disability compensation, the employee shall prove by a preponderance of the evidence that:

* * *

(iii) the industrial accident . . . is the direct cause of the employee's permanent total disability.

STATEMENT OF THE CASE

1. Nature of the Case

This case arises from Quast's application to the Utah Labor Commission for an award of permanent total disability benefits. R. 1-4.

2. Course of Proceedings and Disposition in the Court Below

Quast's sustained a thoracic-spine injury on May 16, 2007, while she was working for Huntsman. She initially filed for benefits in 2008, but the parties resolved that application by stipulation. Specifically, the parties stipulated that Quast's thoracic spine surgery was compensable. Quast developed a non-union, for which she had surgery in 2010. She filed an application for hearing based upon this new surgery to fix the non-union, and for permanent, total disability benefits. The assigned ALJ, Debbie Hann, awarded PTD and other benefits to Quast. Huntsman filed a motion for review.

The Commission vacated the award, and remanded for further medical evidence, post-surgery in 2010. Further evidence was taken, and a new ALJ, Deidre Marlow was assigned. Judge Marlowe concluded that the stipulation of the parties that the first thoracic spine surgery was work-related foreclosed the argument that the surgery to fix the non-union was not work-related. She again awarded PTD and other benefits, and Huntsman again filed a motion for review. Upon review, the Commission found that Quast was not entitled to PTD benefits, but affirmed the decision otherwise. Quast petitioned for review to the Utah Court of Appeals. The Court of Appeals set aside the Commissioner's decision, and allowed the ALJ's award of benefits to stand.

3. **Statement of Relevant Facts on Appeal**

The following facts are found in the Commission's Order on Review of June 2, 2014 (see generally R. 272-273):

"Quast has a learning disability and dropped out of high school in the 12th grade. Quast's employment background consists of working as a hospital housekeeper, where she was required occasional heavy lifting, cleaning bathrooms, taking out the trash, washing walls and floors, making beds, cleaning furniture, and dusting. She has a history of urological problems in addition to migraines and chronic back pain. Quast has suffered various work injuries over the years and has been assessed with different work restrictions as a result; however, there is no indication that she had permanent restrictions as a result of such injuries.

On May 16, 2007, Quast was working for Huntsman when she slipped on a wet floor

and fell to the ground. She underwent decompression and fusion surgery on her thoracic spine performed by Dr. Patel in July 2008. Quast and Huntsman entered into a stipulation that Quast sustained an "injury by accident while in the course and scope of her employment with [Huntsman]." The parties further agreed that the accident "permanently aggravated [Quast's] pre-existing thoracic condition" and that the 2008 surgery was necessary due to the accident.

After she was released to return to work, Quast worked for about a month before resigning. Quast's mid-back pain persisted after the surgery. . . Quast followed up with Dr. Patel, who ordered a CT scan to diagnose her continued back pain. Dr. Patel diagnosed Quast with a nonunion in her thoracic spine at the T11 level and unstable hardware installed during the 2008 surgery. . . Dr. Patel performed a surgical revision later in September 2010 and confirmed the nonunion and failed hardware diagnosis postoperatively.

Following the 2010 surgery, Dr. Lawrence, who took over for Dr. Patel, opined that Quast showed significant improvement since the last surgery and was doing well overall despite her complaints of continued back pain. Quast underwent another functional capacity evaluation in 2012 administered by Ms. Marchant, who concluded that Quast could lift 20 pounds occasionally and 10 pounds frequently and still demonstrated the capacity for light work. . .

Quast testified that she has not attempted to find work since the 2008 surgery. Huntsman presented the testimony of two different vocational rehabilitation experts, Mr. Hiatt and Mr. Barnes, who testified that Ms. Quast could return to work as a housekeeper at

a hotel or an assisted living facility based on her lifting restriction. Neither Mr. Barnes nor Mr. Hiatt could state whether such positions required repetitive bending or reaching." (*Id.*).

Both Judge Hann and Judge Marlowe found that the issue of whether the thoracic spine surgery in 2010 was work-related was foreclosed by the stipulation of the parties. (R. 180-187; 222-232). The Commission agreed, and this has not been cross-appealed. (R. 274). Based upon Quast's thoracic spine injury, and resulting limitations, Judge Hann and Judge Marlowe both found her permanently, totally disabled, and awarded PTD benefits. The Commission set aside that award of PTD benefits. Quast petitioned for review of that decision setting aside PTD benefits. Huntsman did not cross-appeal on any issues, but argued that the denial of benefits should be affirmed because the Commissioner's findings in favor of Quast were not supported by "substantial evidence". Additionally, Huntsman argued that the Commissioner improperly switched the burden of proof from Quast to it, on the issue of "other work reasonably available".

On appeal, the Court of Appeals found that the Commission had improperly added an extra-statutory gloss on the PTD statute, i.e. whether Quast retained "a reasonable degree of strength and flexibility". Without this gloss, the Commission had already found in Quast's favor on the explicit statutory requirements, so the Court of Appeals simply ordered that the ALJ's decision awarding benefits stand. The Court of Appeals implicitly upheld the Commission's findings, that Quast could not perform the "essential functions" of her prior work, and that there was no "other work reasonably available" to her. The Court of Appeals

did not discuss Huntsman's claim that the Commissioner had improperly switched the burden of proof. Quast denied that the burden of proof had, in fact, been switched.

Huntsman petitioned for certiorari on the question whether the Commission erred in adding a medical inquiry beyond whether Quast's industrial injury placed limits on her ability to perform basic work activities. It also petitioned for certiorari on the question whether the burden of proof had been improperly switched from Quast to it.

SUMMARY OF ARGUMENT

The Court of Appeals correctly supported the Commission's decision that Quast suffered a "significant impairment" because it was well-supported by substantial evidence, Likewise, the Court of Appeals correctly affirmed the Commission's findings that Quast could not return to her prior work, and had no "other work reasonably available", because they, too, were supported by "substantial evidence". Huntsman has not marshaled the evidence in favor of Quast, but relies essentially on cherry-picking its own evidence. This does not carry its burden of persuasion that the Commission's decision on these issues was unsupported by substantial evidence.

The Commission's decision that Quast did not have an "impairment . . . that limit[s] [her] ability to perform basic work activities" was logically inconsistent with its conclusion that Quast had a "significant impairment". Further, the Commission's conclusion was logically inconsistent with its own findings of Quast's work-related impairments, that Quast could not perform the "essential functions" of her prior work, and could not perform "other

work reasonably available". Instead, the Commission denied Quast on the basis of a residual medical capacity inquiry that the Court of Appeals correctly declared was not in the PTD statute, and inconsistent with it.

The questions on certiorari seem to believe that the Commission's findings on the statutory elements of permanent, total disability (PTD) were against Quast. Actually, they were in her favor. The only issue on which Quast lost, at the Commission, was the extra-statutory residual medical functioning inquiry that the Court of Appeals rejected in *Oliver v. Labor Comm'n* . If that additional medical inquiry is improper, as beyond the statute, then the Commission's findings in Quast's favor on the statutory elements are supported by "substantial evidence", and the Court of Appeals should be affirmed.

Question on Certiorari No. 1:

> Whether the court of appeals erred in reversing the Labor Commission's determination that Respondent had failed to demonstrate that her ability to perform basic work activities was limited?

Answer:

> The Court of Appeals correctly recognized that two Administrative Law judges, and the Commissioner, had determined that Quast had a "significant impairment" that placed a "limit on [her] ability to perform basic work activities", and properly rejected the Commission's creation of an additional, extra-statutory analysis, which was whether Quast had residual medical functional capacity at that step.

QUESTION ONE

BECAUSE THE COMMISSION DETERMINED THAT QUAST SUFFERED A SIGNIFICANT IMPAIRMENT FROM HER INDUSTRIAL INJURY, IT NECESSARILY DETERMINED THAT QUAST'S ABILITY TO PERFORM BASIC WORK ACTIVITIES WAS LIMITED.

A. The Commission Properly Found Quast Suffered A "Significant Impairment".

The Commission found that Quast had a "significant impairment". Before the Court of Appeals, Huntsman conceded that "[t]here is evidence to support the Commission's conclusion." (Brief of Respondent, p. 10.) While Huntsman asked the Court of Appeals to re-weigh the evidence, the Court of Appeals did not disturb the conclusion of the Commission that Quast suffered a "significant impairment". Huntsman has not sought certiorari review of this conclusion. Therefore, it is now settled that Quast has suffered a "significant impairment". This in turn dictates the conclusion that her impairment placed a "limit on [her] ability to perform basic work activities", for the reasons infra.

B. The Commission Erroneously Treated "Significant Impairment" And "Limit [On] Ability To Perform Basic Work Activities" As Independent And Separate Inquiries, With Different Meanings.

Both "significant impairment" and "limit on ability to perform basic work activities" had well-established legal meanings when the Legislature adopted the current version of the PTD statute, at Utah Code §34A-2-413(1995). Both phrases were richly developed in federal Social Security law, prior to 1995. As a general rule, when the Legislature uses a term or phrase with a well-established legal meaning, it is assumed to have incorporated that

meaning into the statutory use. "When interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning." *Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 32, 219 P.3d 918, 926. And when the Legislature uses a phrase with a specific legal meaning, the Utah Supreme Court assumes that the Legislature meant that same legal meaning.

> The legislature is entitled to invoke specialized legal terms that carry an extra-ordinary meaning. And when it does so we credit the legal term of art, not the common understanding of the words. See Hansen, 2012 UT 9, ¶ 19, 270 P.3d 531. Thus, " when a word or phrase is ' transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.' " Maxfield v. Herbert, 2012 UT 44, ¶ 31, 284 P.3d 647 (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L.REV. 527, 537 (1947)).

State v. Canton, 2013 UT 44, ¶28; 308 P.3d 517, 523. The phrases "significant impairment" and "limit [on] ability to perform basic work activities" both have roots in the same federal soil, namely, the so-called "severity regulation" in Social Security law, at 20 C.F.R. § 404.1521. This Court has previously adopted the federal understanding of subsection (b) of this "severity regulation" in *Provo City v. Serrano*, 2015 UT 32, ¶28, 345 P.3d 1242, 1250, stating that we "look to identical language used in federal social security law . . .".

Quast's case highlights the other part of the "severity regulation", or subsection (a). This part of the "severity regulation" is found at Utah Code §34A-2-413(1)(b)(i). The correct understanding of this regulation, as codified in Utah, is drawn from the history of the "severity regulation", and the United State Supreme Court case which interpreted it, in light

of the Social Security Administration's statement of policy interpreting this regulation, found at SSR 85-28.

SSR 85-28 gives the history of this regulation, and the intended application of it. In summary, the federal statute, 42 U.S.C. 423(d)(1)(A), grants benefits to a person with a disability of sufficient duration. 42 U.S.C. 423(d)(2)(A) then defines disability as the result of an impairment "of such severity" as to cause inability to work. The phrase "of such severity" is not statutorily defined. In order to give some substance to the phrase, 20 C.F.R. §404.1521 was promulgated, the so-called "severity regulation". This regulation introduced the notion of a threshold medical showing of limitation on ability to perform "basic work activities". The Social Security Administration sought to use this as a medical threshold, to dismiss claims before proceeding to adjudicate vocational issues. Due to widespread evidence that the "severity regulation" was being applied to deny claimants who were in fact unable to work due to disability, the federal courts began enjoining or limiting the use of the "severity regulation". Finally, the Social Security Administration issued a ruling to "clarify" that it intend the "severity regulation" to be used to "weed out" insubstantial claims that could never result of a finding of vocational disability. On the basis of this ruling, the United State Supreme Court upheld the validity of the "severity regulation" in *Bowen v. Yukert*, 482 U.S. 137 (1987); 107 S.Ct. 2287, 96 L.Ed.2d 119, 55 USLW 4735.

Understanding this history is important because it was demonstrates the legal meaning given to the phrases "significant impairment" and "limit [on] ability to perform basic work

activities" prior to the adoption of the Utah PTD statute in 1995. That is important because, in 1995, the Utah PTD statute adopted the "severity regulation" in two parts:

FROM THE FEDERAL SEVERITY REGULATION:

20 C.F.R. §404.1521(a):

> "An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities."

TO THE UTAH PTD STATUTE IN 1995:

34A-2-413(1)(b)(i):

> From "An **impairment** or combination of impairments is not severe if it does not **significantly** . . ." to "**significant impairment** or combination of impairments . . ."(Emphasis added).

34A-2-413(1)(c)(ii):

> ". . . limit your physical or mental ability to do basic work activities." adopted, substituting "the employee's" for "your".

Utah's statutory adoption of the "severity regulation" only varies from the federal regulation in the placement of the modifier "significant". This change in placement does not change the meaning, but makes it less awkward to understand by stating it positively rather than in the negative. This answers the Fund's concern that the word "limit" has no modifier, i.e., that even a *de minimus* limitation would qualify for benefits. The modifier "significant" was moved from its position next to "limit" and placed next to "impairment". In either position, it still operates to bar *de minimus* claims of impairment or limitation.

The other difference is how the Utah legislature broke the "severity regulation" into two halves, and placed "significant impairment" in Utah Code §34A-2-413(1)(b) and the rest of the "severity regulation" in Utah Code §34A-2-413(1)(c). This makes sense, because, as the "severity regulation" makes clear, it is defining "significant impairment" as an impairment that places a "limit [on] ability to do basic work activities." The placement of those two halves in the Utah PTD statute is consistent with the use of the term "permanent, total disability", followed by a statutory definition of that term:

Employee Must Show:	
Elements (subsection (b)):	Definitions of elements (subsection (c)):
Medical	
"Significant impairment" 34A-2-413(1)(b)(i)	"Impairment that . . . limit the employee's ability to do basic work activities" 34A-2-413(1)(c)(ii) "basic work activities" defined by Commission Rule and 20 C.F.R. 404.1521
Vocational	
"Permanent, total disability" 34A-2-413(1)(b)(ii)	"Not gainfully employed" 34A-2-413(c)(i) "impairments prevent employee from performing essential functions" of historical work activities 34A-2-413(1)(c)(iii) "employee cannot perform other work reasonably available etc. . ." 34A-2-413(c)(iii)

The overall point here is that, while the Utah PTD statute re-arranges the federal pieces somewhat, the big picture remains the same. The substantive meaning of the PTD statute is the same as the sequential decision-making process of Social Security, but re-arranged for analytic clarity.

This now demonstrates the problem in Quast's case. The Commission found that

Quast met the element "significant impairment", which is now res judicata. At the same time, the Commission found that Quast did not meet the definition of "significant impairment", i.e., an impairment which places a "limit [on her] ability to perform basic work activities." In other words, the Commission found Quast "significantly impaired", while at the same time not meeting the elements of being "significantly impaired".

Quast resolved this internal contradiction by looking to the sequential decision-making process of the Social Security Act, and the similar sequential layout of the Utah PTD statute.

C. The Commission Erred By Not Taking The PTD Elements In Sequential Order.

Historically, The PTD Statute Required Sequential Decision-Making.

As of 1991, the predecessor to the current PTD stated:

> Permanent total disability . . . requires a finding by the commission of total disability, as measured by the substance of the **sequential** decision-making process of the Social Security Administration under Title 20 of the [C.F.R.]. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520(b), (c), (d), (e), and (f)(1) and (2), as revised.

Utah Code § 35-1-67(1)(1991). This specifically called for sequential decision-making.

Comparing The SSDI Sequential Decision-Making Process To The Utah PTD Statute.

To see that the sequential substance of the SSA decision-making process has been codified in the 1995 PTD statute, compare the two, first decision-making process outlined at 20 C.F.R. §404.1520(a), then Utah Code §35-1-67(1)(c)(1995):

Step One: "At the first step, we consider your work activity, if any. If you are doing

substantial gainful activity, we will find that you are not disabled." 20 C.F.R. 404.1520(a)(4)(i).

". . . the commission shall conclude that . . . (i) the employee is not **gainfully employed** . . .". Utah Code §35-1-67(1)(c)(i)(1995).

Step Two: "At the second step, we consider **the medical severity of your impairment(s)**. If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 404.1509 , or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. 20 C.F.R. 404.1520(a)(4)(ii).

". . . the commission shall conclude that . . . (ii) the employee has an impairment or combination of impairments that **limit** the employee's ability to do **basic work activities**; . . .". Utah Code §35-1-67(1)(c)(ii)(1995). This is the same thing; see *infra*.

Step Three: "At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 of this subpart and meets the duration requirement, we will find that you are disabled." 20 C.F.R. 404.1520(a)(4)(iii).

This third step refers an applicant to the medical impairment listings. If an applicant meets one of these listings, he is presumed to be disabled without further vocational analysis. The Utah Legislature did not adopt a statutory counterpart to this SSA step.

Step Four: "At the fourth step, we consider our assessment of your residual functional capacity and **your past relevant work**. If you can still do your past relevant work, we will find that you are not disabled." 20 C.F.R. 404.1520(a)(4)(iv).

". . . the commission shall conclude that . . .(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing **the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident** . . . Utah Code §35-1-67(1)(c)(iii)(1995).

Step Five: "At the fifth and last step, we consider our assessment of **your residual**

> **functional capacity** and **your age, education, and work experience** to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled." 20 C.F.R. 404.1520(a)(4)(v).
>
> ". . . the commission shall conclude that . . .(iv) the employee cannot perform other work reasonably available, taking into consideration **the employee's age, education, past work experience, medical capacity, and residual functional capacity.** Utah Code §35-1-67(1)(c)(iv)(1995).

Note that for cases arising before 1995, the Commission has explicitly adopted the SSA sequential decision-making regulations in UT Admin. Code R612-200-5B. Permanent Total Disability.

Quast argued to the Court of Appeals that the Commission, by finding that she met the vocational requirements of the PTD statute, necessarily met the medical impairment threshold. This is consistent with SSR 85-28, which points out that:

> By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work.

SSR 85-28. The converse is true also: if a worker is unable to perform "past relevant work" and cannot perform "other work reasonably available", they must necessarily have a significant impairment that limits the ability to perform "basic work activities".[1]

---

[1]Huntsman argues that the absence of direct incorporation of federal law into Section 413 precludes reference to established legal meaning of specific words or phrases. This contradicts the Commission's adoption of the federal meaning of the phrase "basic work activities", and the Court's reference to regulations in *Provo City v. Serrano.*

D. The Court Of Appeals Correctly Rejected The Commission's Attempt To Read Extra-Statutory Burdens Into The PTD Statute.

The Court of Appeals correctly refused to read the "severity regulation", as adopted in the Utah PTD statute, as requiring anything more than a showing that an impairment placed a "limit [on] ability to perform basic work activities." In Quast's case, that meant a showing that her industrial medical impairment limited her ability to walk, stand, sit, lift, bend or twist, which are all "basic work activities". Her medical records clearly established that she had these limitations, on an industrial basis. The Commission's finding that Quast had a "significant impairment" confirmed this, and was supported by substantial evidence.

The Commission went beyond this, to consider whether, despite these limitations, she "still has a reasonable degree of strength and flexibility". This inquiry into what Quast retains AFTER her industrial limitations is exactly contrary to the statute. The "significant impairment" inquiry is a threshold inquiry at the start, not an analysis of what is left over at the end of the inquiry.

The apparent reason that the Commission felt the need to add additional statutory language is to respond to the concern of the Fund that the word "limit" is without "limit", so to speak. This concern is gone if one understands that the word "limit" is "limited" by the modifier "significant" in both the Social Security program and the Utah Act. In the Social Security Act, the modifier "significant" appears in the regulation interpreting the statutory words "such severity". I.e., for Social Security, an impairment is "severe" if it "significantly

limit[s] your physical or mental ability to do basic work activities." In the Utah Act, the modifier "significant" appears in the statute itself, (1)(b), "significant impairment". (1)(c)(ii) defines the word "significant" as "an impairment [...] that limit[s] the employee's ability to do basic work activities." See discussion supra.

If one does not understand that (1)(c)(ii) is a definition of (1)(b), then there is no "limit" to the concept of a "limit". But if one understands that (1)(c)(ii) is a definition of "significant impairment", then the definition is modified by the word "significant" in (1)(b), or incorporated into it. Additionally, the federal usage of the phrase, and the context of the sequential decision-making of the Utah PTD both place a "limit" on the concept of "limit". They illuminate the meaning. There is no need for confusion.

The Court of Appeals correctly treated "limit . . . basic work activities" as a medical question, not a vocational question. And it correctly evaluated the limitations that Quast's injuries had on her ability to perform basic work activities. It correctly concluded that the undisputed medical evidence found by the Commissioner pointed without question to a conclusion that Quast suffered a "significant impairment", i.e., a "limit [of her] ability to do basic work activities." The Court of Appeals correctly rejected this attempt to read an extra-statutory burden into the PTD statute, a burden that went beyond a "limit [on] ability to perform basic work activities."[2]

---

[2]The Court of Appeals overstated its holding in one sentence: "There is no qualitative restriction before a finding of "limited" can be made." *Quast*, at ¶9. The

QUESTION TWO

Question on Certiorari No. 2:

Whether the Court of Appeals erred in concluding that substantial evidence did not support the Commission's conclusions.

Answer:

As to whether Quast suffered a "significant impairment", that issue is addressed supra. The Commission found that Quast suffered a "significant impairment", and Huntsman conceded on appeal that evidence supported this. The Court of Appeals correctly refused to re-weigh the evidence on this point. The Commission erroneously went beyond this.

As to whether Quast was prevented by her "significant impairments" from "performing the essential functions" of her prior work, two ALJs and the Commission concluded that Quast was unable to return to her prior work as a housekeeper. This conclusion was supported by substantial evidence, as the Court of Appeals correctly recognized. Huntsman did not seek certiorari on this issue, and did not brief it. Quast does not understand this to be in dispute, on certiorari. As explained supra, this finding alone requires the conclusion that Quast met the medical severity threshold.

The Commission's conclusion was that Quast was unable to do "other work

---

qualitative restriction is that a limitation be "significant", i.e., more than minimal, consistent with the "severity regulation" as well as S.S.R. 85-28.

reasonably available". That conclusion was supported by substantial evidence, as the Court of Appeals correctly recognized. Huntsman did not seek certiorari on the question whether substantial evidence supported the findings by two ALJs and the Commission that Quast was unable to return to other work reasonably available. As to the burden of proof question on this issue, see infra. Regardless of whether the legal burden of proof issue was preserved or harmless error, the finding itself was supported by substantial evidence.

QUESTION THREE

HUNTSMAN FAILED TO PROPERLY PRESERVE ITS OBJECTION TO THE COMMISSION'S USE OF "BURDEN OF SHOWING"

Question on Certiorari No. 3:

Whether the court of appeals erred in accepting the Commission's statement regarding burdens of proof with respect to the question of the availability of other work and in declining to treat Petitioner's challenge to that statement as an alternate ground for affirmance.

Answer to Question No. 3:

This issue was not properly preserved below. Given the lack of preservation, it is unclear exactly what the Commissioner meant when discussing the "burden" imposed on Huntsman. Quast presumes that the Commissioner was familiar with *Martinez v. Media-Paymaster Plus*, 2007 UT 42; 164 P.3d 384, which placed the ultimate burden

of proof on the worker. Quast therefore assumes that the Commissioner was referring to the burden of going forward, after Quast's *prima facie* showing of inability to do "other work reasonably available". Or possibly the Commissioner meant the burden of persuasion in overturning the findings of two different ALJs on that issue. Either conclusion would be justified. Because Huntsman failed to preserve this issue by asking the Commissioner what she meant, all one can do at this point is speculate.

A. The Commissioner Meant The Burden Of Going Forward, To Rebut Quast's Prima Facie Showing Of Permanent Total Disability.

The Commissioner did not say the "burden of proof" was on Huntsman, despite the phrasing of the question on certiorari. She merely said, Huntsman's "burden of showing". This is no small distinction. The "burden of showing", in other words, going forward, arises after the party with the burden of proof makes a *prima facie* case:

> A prima facie case has been made when evidence has been received at trial that, in the absence of contrary evidence, would entitle the party having the burden of proof to judgment as a matter of law. See, e.g., State v. Wood, 2 Utah 2d 34, 38, 268 P.2d 998, 1001 (1954).

Bair v. Axiom Design, LLC, 2001 UT 20, ¶14; 20 P.3d 388, 392.

Quast made an initial showing sufficient to persuade both ALJs and the Commission that there was no "other work reasonably available". See e.g., 1/31/14 Order on Remand, p. 8. In the absence of contrary evidence, Quast would have been entitled to a decision in her favor, as a matter of law. *Bair*, supra. Huntsman attempted to factually rebut this by calling vocational witnesses, to testify that Quast could indeed work as a housekeeper, despite her

limitations. The ALJ and the Commission found that Huntsman failed to pull off this factual offer of proof, i.e., failed its burden of showing what it set out to prove. Huntsman had no obligation to call any vocational witnesses at all, and could have chosen to rely solely upon Quast's ability to carry her legal burden of proof. This strategy ran the risk of losing, given Quast's compelling evidence. Rather than place all its eggs in that basket, Huntsman affirmatively offered vocational evidence, which was not persuasive, in opposing Quast's proof. The Commissioner undoubtedly meant nothing more.

B. Huntsman Failed To Carry Its Burden Of Persuasion On Administrative Review, That Two Different ALJs Erred In Concluding That Quast Could Not Perform "Other Work Reasonably Available".

Alternatively, the Commissioner may have meant that Huntsman failed to carry its "burden" of persuasion to reverse the findings of fact and conclusions of law of Judge Marlowe, and Judge Hann, including the finding that Quast could not "perform other work reasonably available". Upon this administrative review, the Commissioner reviewed a "cold" evidentiary record. The statutory basis for this administrative review is Utah Code §63G-4-301(2008). This statute does not contain any statement of the standard of review that the Commission should use in reviewing findings of fact by the ALJ. Courts across the country vary on this question, often depending on the specific language of the workers compensation system. See generally, Larson, Workmen's Compensation §130.03D[3], listing the various approaches by jurisdiction. California's approach gives recognition to the fact that the Commission reviews a "cold" record, whereas the ALJ has first-hand opportunity to view the

testimony of the witnesses:

> When the WCJ's finding is supported by solid, credible evidence, it is to be accorded great weight by the Board and should be rejected only on the basis of contrary evidence of considerable substantiality; and the WCJ's findings on credibility are entitled to great weight because the WCJ has the opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand.

Rubalcava v. Workers' Comp. Appeals Bd., 220 Cal.App.3d 901, 269 Cal.Rptr. 656 (2d Dist., 4th Div. 1990). This approach is sound, and should be adopted, in reviewing the Commission's decision to endorse or reject the decisions of ALJs.

Where the decision being reviewed relies upon first-hand encounter with facts and other matters not "adequately reflected in the record available to appellate courts", *State v. Levin*, 2006 UT 50, ¶25, 144 P.3d 1096, deference is required. On the other hand, where, as here, "the appellate court is in as good a position as the trial court to resolve the issue", non-deferential review is appropriate. *In Re Baby B*, 2012 UT 35, ¶43, 308 P.3d 394. The *Levin* factors referred to in *In Re Baby B* were elaborated upon in a companion case, *Sawyer v. Dep't of Workforce Serv.*, 2015 UT 33. There, the Court stated that the standard of review was trending toward a "binary" result: fact-like determinations receive deferential review, and law-like determinations receive de novo review. If it is appropriate for the appellate courts to give deference to trial courts who actually face the witnesses, it is appropriate for the Commissioner to give deference to the findings of fact made by ALJs who actually face and evaluate witnesses.

Quast relied upon the evidentiary facts found by Judge Hann and Judge Marlowe. It is reasonable to conclude that, upon administrative review, the Commission, giving deference to the ALJs fact-finding, found that Huntsman had failed to carry its burden of persuasion that these two ALJs, who had the opportunity to eyeball the witnesses, had gotten it wrong. Both ALJs specifically held Quast to the ultimate burden of proof on all elements of PTD, in accord with *Martinez v. Media-Paymaster*. Both ALJs found that Quast carried that burden of proof on all elements, including proof that she could not "perform other work reasonably available". The Commission declined to disturb these conclusions, granting deference to the ALJs on disputed issues of credibility and face-to-face evaluation of witnesses.

C. Any Error By The Commissioner In Describing The Burden Of Proof Is Harmless.

Quast believes this entire issue to be a red herring, because there was no evidence in the record to conclude otherwise than how the Commissioner did. In other words, there was no contrary evidence that Quast could do other work reasonably available. The ALJs both made specific findings of fact that Quast's employment with Huntsman did involve bending and twisting. Huntsman's vocational witnesses did not know whether Quast's limitations on bending or twisting would preclude her from other work as a housekeeper. They offered only other housekeeping and light assembly as other vocational possibilities. But they were unfamiliar with the specific physical demands of those jobs. The Commissioner herself stated that Huntsman's experts "did not sufficiently address her restriction against repetitive bending of the spine", and rejected that testimony. (Order on Motion for Review, p. 7). Judge

Marlowe found that Huntsman's expert "did not know the specific job tasks" for other housekeeping work. She found that Huntsman's experts "were not aware of the specific job requirements for [light assembly work] and was [sic] unable to provide any details as to the physical requirements of these jobs other than meeting [Quast's] lifting weight restrictions." (J. Marlowe Findings and Conclusions, p. 8-9). On that basis, the ALJs and the Commissioner discounted those vocational witnesses entirely. This left no evidence in the record to conclude that there was any "other work reasonably available" to Quast, and an abundance of evidence that there was no "other work reasonably available". Regardless of who had the burden of proof, there was no evidence of other work reasonably available to Quast. On the other hand, there was ample evidence that Quast could not do other work, as both ALJs and the Commissioner concluded.

The "substantial evidence" that Huntsman argues supports a finding that Quast had "other work reasonably available" is its own vocational witnesses. (Petitioner's Brief on Certiorari, p. 18). However, this is same evidence that both ALJs and the Commissioner rejected. Quast is not able to understand how evidence rejected by both ALJs and the Commissioner can be "substantial evidence" to support the Commission's conclusion.

For Huntsman to show that the Commissioner's statement on burden was not harmless, it would have to marshal the facts, to the extent necessary to persuade the Court of Appeals or this Court that there was some other conclusion that could have been reached on this record. Huntsman has not attempted this marshaling, but merely relies upon an

alleged incorrect legal statement of burden of proof. All one needs to do is read the facts recited in the ALJs' rulings and the Commissioner's decision, to realize why Huntsman has not marshaled the factual record:

> [Quast] also has a very limited intellectual functioning. [Quast] was not able to complete high school even with the assistance of special education. [Quast] has a limited ability to read, write, understand math or to learn. [Quast] also suffer from a developmental disability. [Quast] received special education and dropped out of high school in the 12th grade. [Quast] testified she suffers from dyslexia, which causes her to read things upside down or backwards.
>
> * * *
>
> [Quast] is 39 years old and dropped out of high school in 12th grade. [Quast] was in special education classes in high school and suffers from a learning disability. [Quast's] work experience is as a hospital housekeeper. As a result of the [industrial injury], she is restricted to lifting no more than 20 pounds and must avoid any repetitive flexion and extension of the thoracic spine. [Quast] also has limited intellectual abilities. [Quast's] work history is unskilled labor. As a result, she does not possess transferrable work skills.

ALJ (Marlowe), Findings of Fact, p. 6-8.[3] Quast has an IQ that ranges from 55-60, to at most, 70. (R. 47-48, 181, 228). The Commissioner did not find that Quast had transferrable work skills, nor did Huntsman ever argue that there were any. Quast's intellectual and learning disabilities were undisputed. Her work history was undisputed. On this record, no other conclusion could have been drawn but that Quast was totally disabled.

---

[3]Huntsman's doctor stated that Quast retained "full functional range of motion in her entire spine." Order on Review, p. 7. This is a medical impossibility. Quast's spine is fused from T7-T12. (J. Marlowe, FF/CL, p. 6). This makes it anatomically impossible to bend or twist her back normally. Further, Quast has a 22% impairment of her spine. (Id.) It is not possible to have "full functional range of motion in her entire spine" with a 22% impairment.

Anyway, any error in understanding the burden of proof would not constitute an alternate ground for affirmance of the denial of benefits. Remand here would be pointless, because the record contains no evidence there was any other work reasonably available to Quast, given her intellectual and physical limitations. Any error was harmless.

CONCLUSION

The Court of Appeals correctly affirmed the Commission's conclusions in favor of Quast on the statutory elements of PTD, because they were supported by "substantial evidence". Specifically, the Court of Appeals correctly affirmed the Commissioner's conclusion that Quast suffered a "significant impairment". This necessarily meant that Quast had a "limit [on her] ability to perform basic work activities." The Court of Appeals correctly rejected the Commission's use of an extra-statutory residual medical functioning inquiry, which does not logically connect to the initial "severity" inquiry, as codified by the Utah PTD statute. Remaining medical functioning might justify a re-employment effort, after a finding of PTD, but it makes no sense to apply this as a bar to an initial finding of PTD. The Court of Appeals correctly affirmed the Commission's finding that Quast could not perform the "essential functions" of her prior housekeeping employment was supported by "substantial evidence". Finally, the Court of Appeals properly affirmed the Commissioner's conclusion that the record supported the ALJs' conclusion that Quast could not perform any "other work reasonably available", and that Huntsman had failed to rebut Quast's *prima facie* showing.

The Commission is using the statutory requirement that a worker show impairments

that "limit the employee's ability to perform basic work activities" as a roadblock to deny benefits to workers otherwise unable to participate in the workforce. This distorts the accepted legal meaning of this phrase. This Court has clearly stated that terms with specific legal meanings in the Social Security context are to be given those same meanings under state law. This phrase, which is the definition of "significant impairment", is a minimal, threshold showing of medical impairment. It is not some super-disability category. The United States Supreme Court noted that every federal circuit had rejected the similar use of this phrase to deny persons who were actually disabled. The SSA issued SSR 85-28 to "clarify" that it would only use the limitation on "basic work activities" as a threshold screening test, to weed out applicants who could not show disability due to a minimal medical impairment. This usage was well-understood when Utah adopted the PTD statute in 1995.

Quast is precluded by her injury from participation in the work force, either her prior work, or "other work reasonably available". The Commission has created some super-disability standard, that goes beyond inability to participate in the labor force. This goes beyond the statutory requirements. The Court of Appeals correctly rejected the Commission's extra-statutory standard, and remanded for entry of an Order of permanent, total disability benefits, in accordance with the decisions of Judge Hann, Judge Marlowe, and the Commission's own finding that Quast cannot return to prior work and there is no other work "reasonably available". The Court of Appeals should be affirmed.

DATED this 25th day of April, 2016.

BERTCH ROBSON ATTORNEYS

/s/ Daniel F. Bertch

Daniel F. Bertch
Attorney for Appellee Quast

CERTIFICATE OF LENGTH

I certify that, by my word processor's internal count, there are less than 14,000 words (actual count, 7,814; Times New Roman, 13 pt. type, in this Appellee's Brief.

DATED this 25th day of April, 2016.

BERTCH ROBSON ATTORNEYS

/s/ Daniel F. Bertch
Daniel F. Bertch
Attorney for Appellee Quast

ADDENDUM INDEX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of April, 2016, I caused a true and correct copy of the foregoing APPELLEE'S BRIEF to be mailed, postage prepaid, and sent via email, to the following:

Hans M. Scheffler
WORKERS COMP. FUND OF UTAH
100 West Towne Ridge Parkway
Sandy, UT 84070
hscheffl@wcfgroup.com

Jaceson Maughn
UTAH LABOR COMMISSION
160 East 300 South, 3rd Floor
P.O. Box 14660
Salt Lake City, UT 84114-6600
laborcom@utah.gov

By: */s/ Daniel F. Bertch*

ADDENDUM "A"
Findings of Fact, Conclusions of Law, And Order, March 10, 2011.

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
Heber M Wells Building, 3rd Floor
160 E 300 S, 3rd Fl
Salt Lake City UT 84114
(801) 530-6800

RASHELL QUAST, Petitioner, vs. UNIVERSITY OF UTAH HUNTSMAN CANCER HOSPITAL and/or WORKERS COMPENSATION FUND, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Case No. 10-0208 Judge Debbie L. Hann

HEARING: Labor Commission, 160 E 300 S, Salt Lake City, UT 84114-6615, Room - 332 on January 27, 2011 at 8:00 AM. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Debbie L. Hann, Administrative Law Judge.

APPEARANCES: The petitioner, Rashell Quast, was present and represented by her attorney Kevin Robson Esq.

The respondents, University of Utah Huntsman Cancer Hospital and Workers Compensation Fund, were represented by attorney Hans Scheffler Esq.

STATEMENT OF THE CASE

The petitioner's March 22, 2010 Application for Hearing alleges entitlement to medical expenses, recommended medical care, temporary total disability compensation, temporary partial disability compensation, permanent partial disability compensation, permanent total disability compensation and interest. The Commission began a formal adjudication of the petitioner's claim on March 24, 2010 with an Order for Answer.

The respondents' April 26, 2010 Answer admits the petitioner was injured by accident on the date alleged and that she suffered injuries consistent with the parties' stipulation, approved by the Commission on January 8, 2009. The respondents denied that the petitioner is entitled to any additional compensation or medical treatment or that she is permanently totally disabled as the result of the industrial accident.

At the hearing, the petitioner withdrew her claims for temporary compensation because compensation was paid through March 19, 2010. The petitioner requested permanent total disability compensation beginning March 19, 2010 and payment for the September 2010 back surgery and ongoing treatment.

The respondents agreed, based upon the January 8, 2009 Stipulation and Order issued in Case No. 08-0988, that the petitioner's May 16, 2007 industrial accident caused a permanent aggravation of her pre-existing back condition. The respondents disputed that the petitioner is permanently totally disabled as the result of this accident and that it is not the direct cause of her inability to work.

The parties stipulated the petitioner's compensation rate for this claim is $282.00 per week.

FINDINGS OF FACT

The petitioner was injured by accident arising out of and in the course of her employment with the respondent, University of Utah Huntsman Cancer Hospital on May 16, 2007 which resulted in a permanent aggravation of her pre-existing thoracic condition resulting in a decompression and fusion surgery on July 1, 2008. (Exhibit R2).

The petitioner is not gainfully employed. The petitioner returned to her job and attempted to work for about 1.5 months after her July 2008 surgery. The petitioner was unable to physically perform her job duties as a housekeeper for the respondent. The petitioner's last day worked was two months and 3 weeks prior to her September 7, 2010 surgery which would have been June 17, 2010. This surgery was performed to repair the petitioner's non-union from the July 1, 2008 surgery. Medical exhibit 141, 874-877.

The petitioner has a significant impairment. The petitioner's thoracic spine is fused from T7-T12. She is now limited to lifting 20 pounds and must avoid any repetitive flexion or extension of her thoracic spine. The petitioner's thoracic spine condition has been rated at 22% whole person, of which 12% is due to the May 16, 2007 industrial accident. The petitioner also suffers from a developmental disability. The petitioner received special education and dropped out of high school in the 12th grade.[1] The petitioner testified she suffers from dyslexia, which causes her to read things upside down or backwards. The petitioner also suffered from chronic pain and depression prior to the industrial accident. The petitioner was also born with underdeveloped kidneys and now has only one kidney. The petitioner had bilateral upper extremity pain which has been surgically treated. She also suffers from migraines.

[1]Although not presented as an exhibit at the hearing, attached to the petitioner's Application for Hearing is a copy of the February 17, 2010 Notice of Attorney Advisor Decision-Fully Favorable which granted the petitioner Social Security Disability benefits on the basis of her thoracic spine condition and borderline intellectual functioning. The decision notes that psychological testing conducted as part of the Social Security evaluation revealed below average intellectual functioning, including a full scale intelligence quotient score of only 70. This evidence must be addressed in any subsequent proceedings related to re-employment.

The petitioner has a limited ability to do basic work. The petitioner suffers from a 22% whole person impairment of her thoracic spine which limits her ability to lift more than 20 pounds or to flex or extend her thoracic spine. The petitioner also has a very limited intellectual functioning. The petitioner was not able to complete high school even with the assistance of special education. The petitioner has a limited ability to read, write, understand math or to learn. The combination of the petitioner's physical and intellectual limitations limit her ability to perform basic work activities.

The petitioner's thoracic back condition as the result of the May 16, 2007 industrial accident prevents her from performing the essential functions of the basic work activities for which she was qualified to perform at the time of industrial accident. The petitioner has worked as a housekeeper in hospitals for about 20 years. The petitioner was required to lift 50-70 pounds, clean bathrooms, wash walls, clean furniture, make and clean beds, sweep and mop floors and dust. Housekeeping in a hospital setting is medium level physical demand work. The petitioner's work restriction of no lifting over 20 pounds alone takes her out of this category of work. The petitioner has no other work experience.

The petitioner is 39 years old and dropped out of high school in 12th grade. The petitioner was in special education classes in high school and suffers from a learning disability. The petitioner's work experience is as a hospital housekeeper. As a result of the May 16, 2007 accident, she is restricted to lifting no more than 20 pounds and must avoid any repetitive flexion and extension of her thoracic spine. The petitioner also has limited intellectual abilities.

The petitioner's work history is unskilled labor. As a result, she does not possess any transferrable work skills.

Mike Hyatt, the respondents' vocational expert, believes the petitioner can perform work as a hotel/motel housekeeper because it meets the light category of work which is the category of work that does not require lifting over 20 pounds.

Working as a hotel/motel housekeeper would require the petitioner to change linens, strip and make beds, vacuum, clean bathrooms, empty garbage cans and dust. Stripping a bed requires the blanket and cover to be pulled off and the sheets and pillow cases removed. The majority of hotels and motels do not utilize fitted sheets, requiring extra bending at the thoracic level to fold corners when making the bed with fresh linens. Cleaning bathrooms requires the petitioner to mop floors and clean the sinks and counter at waist level requiring bending at the thoracic level. Cleaning over sink mirrors also requires reaching upward and forward. Most hotel/motel bathrooms contain a tub/shower combination that requires reaching and bending with the upper body to clean. Cleaning a toilet also requires bending and reaching of the upper body. Vacuuming carpet requires movement of more than the arm maneuvering the vacuum. This task too requires flexion and extension of the thoracic spine. A hotel/motel housekeeper is required to clean many rooms a day at a quick pace. Although the lifting requirements are 20 pounds or

less, the majority of tasks a hotel/motel housekeeper performs require repetitive extension and flexion of the thoracic spine. The job of hotel/motel housekeeper would require the petitioner to engage in repetitive flexion and extension of her thoracic spine and exceeds her medical restrictions as the result of the May 16, 2007 industrial accident.

Paul Barnes, the respondent's vocational expert believes the petitioner can perform a job at Avalon Health Care, an assisted living home for veterans, as a housekeeper. Mr. Barnes did not know the specific job tasks other than having past experience and being able to read, write and follow oral and written directions. An assisted living home would have bedrooms and bathrooms where the residents live that a housekeeper would clean. The housekeeping tasks would be the same or similar to that of a hotel/motel housekeeper. Based upon the above findings related to hotel/motel housekeeping, a housekeeper in an assisted living home would require repetitive flexion and extension of the petitioner's thoracic spine and exceed her work restrictions as the result of the May 16, 2007 industrial accident.

Mr. Barnes also opined that the petitioner could engage in light assembly work assembling light medical plastics and that job openings exist Optima Consulting and Integra Life Sciences. Mr. Barnes was not aware of the specific job requirements for these jobs and was unable to provide any details as to the physical requirements of these jobs other than meeting the petitioner's lifting weight limitation. In identifying light housekeeping and light assembly work as other work the petitioner could perform, Mr. Hyatt agreed that bending and reaching is not always noted in the Dictionary of Occupational Titles, which formed the basis of his opinion. The undersigned finds that most assembly work requires rapid reaching and bending of the upper back to assemble parts, either at a work station table or an assembly line. Neither Mr. Barnes nor Mr. Hyatt described the jobs they identified as not having this requirement.

The other work identified by the respondents does not meet the petitioner's work limitation of having to avoid any repetitive flexion and extension of her thoracic spine.

The petitioner cannot perform other work reasonably available, taking into consideration her age, education, past work experience, medical capacity and residual functional capacity.

The petitioner has very limited intellectual abilities and her work history is dominated by one task: cleaning. Although the petitioner suffered from many conditions, including depression, chronic pain, including neck and back pain, migraines, incontinence, upper extremity pain and other ailments, she continued to do her work as a hospital housekeeper, classified as medium level physical demand work, until the May 16, 2007 industrial accident. The petitioner also tried to return to her work as a housekeeper following treatment for her injuries as the result of this accident but was not successful due to her physical limitations following the thoracic fusion surgery. The petitioner did not have physical restrictions that prevented her from performing her job duties until the May 16, 2007 industrial accident. The petitioner's January 26, 2007 industrial injury is direct cause of the petitioner's permanent total disability

The petitioner is preliminarily permanently totally disabled as the result of the May 16, 2007 industrial accident beginning June 18, 2010, when the petitioner was no longer able to work as the result of his thoracic spine condition.

Based upon the parties' stipulation, the he petitioner's permanent total disability compensation rate for the May 16, 2007 date of injury is $282.00 per week.

The petitioner is entitled to payment of medical expenses related to her September 7, 2010 thoracic surgery to repair the non-union from the prior surgery. There is no dispute that the petitioner suffered a non-union. Both Dr. Patel and Dr. Newton agree on this point. Although Dr. Newton opined that it was not "an urgency" he has not opined the surgery was not necessary to treat this condition.

PRINCIPLES OF LAW

Utah Code Ann. § 34A-2-401 requires compensation be paid only for those injuries arising out of and in the course of employment. For an injury to be compensable under the Act, a petitioner must show by evidence, opinion or otherwise that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability and in the event a petitioner cannot show a medical causal connection, compensation should be denied. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

Utah Code § 34A-2-413 states in relevant part:

> (1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.
> (b) To establish entitlement to permanent total disability compensation, the employee must prove by a preponderance of evidence that:
> (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
> (ii) the employee is permanently totally disabled; and
> (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.
> (c) To establish that an employee is permanently totally disabled the employee must prove by a preponderance of the evidence that:
> (i) the employee is not gainfully employed;
> (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
> (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim;

and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's:

(A) age;
(B) education;
(C) past work experience;
(D) medical capacity; and
(E) residual functional capacity.

* * * *

CONCLUSIONS OF LAW

The petitioner suffered a compensable industrial accident on May 16, 2007 while employed by the respondent, University of Utah Huntsman Cancer Hospital.

The petitioner is tentatively permanently totally disabled as the result of the May 16, 2007 industrial accident.

The respondents, University of Utah Huntsman Cancer Hospital and Workers Compensation Fund, are liable to the petitioner for permanent total disability compensation at the rate of $282.00 per week beginning June 18, 2010 and continuing until further order of the Commission.

The respondents, University of Utah Huntsman Cancer Hospital and Workers Compensation Fund, are liable to the petitioner for treatment of her thoracic spine condition, including payment for the September 7, 2010 surgery, pursuant to the Commission RBRVS fee schedule plus interest at the rate of 8% per annum.

ORDER

IT IS THEREFORE ORDERED that the respondents, University of Utah Huntsman Cancer Hospital and Workers Compensation Fund, pay the petitioner subsistence benefits at the rate of $282.00 per week beginning June 18, 2010 and continuing until further order of the Commission. Those amounts accrued to date are due and payable in a lump sum plus interest at the rate of 8% per annum.

IT IS FURTHER ORDERED that statutory attorneys' fees shall be paid directly to Daniel F. Bertch Esq, according to Utah Code § 34A-1-309 and Utah Administrative Code, Rule 602-2-4. That amount shall be deducted from petitioner's award and sent directly to Mr. Bertch's office.

IT IS FURTHER ORDERED that the respondents, University of Utah Huntsman Cancer Hospital and Workers Compensation Fund, pay the petitioner for necessary medical treatment incurred to treat her thoracic spine condition as the result of the industrial accident, including,

but not limited to, the September 7, 2010 surgery, pursuant to the Commission RBRVS fee schedule, plus interest at the rate of 8% per annum.

IT IS FURTHER ORDERED that the respondents, University of Utah Huntsman Cancer Hospital and Workers Compensation Fund, notify the Commission in writing within 30 day of the date of this order whether a re-employment plan shall be submitted. If the respondents elect to submit a re-employment plan within 30 days of the date of this order, the re-employment plan shall be submitted to the Commission within 90 days of the date of this order.

DATED this 10th day of March, 2011.

Debbie L. Hann
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

Rashell Quast vs. University of Utah Huntsman Cancer Hospital and/or Workers Compensation Fund Case No. 10-0208

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law and Order, was mailed by prepaid U.S. postage on March 10, 2011, to the persons/parties at the following addresses:

Rashell Quast
3831 S Hummingbird
Salt Lake City UT 84123

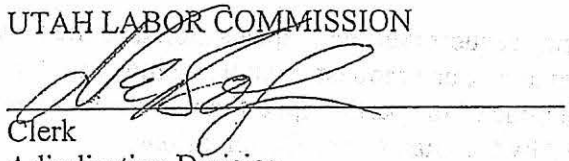
University of Utah Huntsman Cancer Hospital
2000 Cir Of Hope
Salt Lake City UT 84112

Workers Compensation Fund
Dennis V Lloyd Designated Agent
100 W Towne Ridge Pkwy
Sandy UT 84070

Daniel F Bertch Esq
1996 E 6400 S Ste 100
Salt Lake City UT 84121

Hans Scheffler Esq
Workers Compensation Fund Legal Dept
100 W Towne Ridge Pkwy
Sandy UT 84070

UTAH LABOR COMMISSION



Clerk
Adjudication Division

ADDENDUM "B"
Findings of Fact, Conclusions of Law, And Order, January 31, 2014.

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
Heber M. Wells Building, 3rd Floor
160 E. 300 S., 3rd Fl.
P.O. Box 146615
Salt Lake City, UT 84114
(801) 530-6800

RASHELL QUAST, Petitioner, vs. UNIVERSITY OF UTAH HUNTSMAN CANCER HOSPITAL; WORKERS' COMPENSATION FUND, Respondents.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER UPON REMAND Case No. 10-0208 Judge Deidre Marlowe

Hearing: August 7, 2012
Appearances:
Daniel F. Bertch for the Petitioner
Hans Scheffler for the Respondents

PROCEEDINGS

The Petitioner originally filed a claim with the Adjudication Division on August 13, 2008 regarding a May 16, 2007 industrial injury. That adjudication was assigned Case No. 08-0988. The parties did not participate in a hearing but resolved that case through a stipulation.

In the stipulation the parties agreed that the Petitioner had sustained an injury by accident while in the course and scope of her employment with the University of Utah on May 16, 2007 when she slipped and fell onto the floor, sustaining injuries to her mid-back, left knee and left hip. More specifically, the parties agreed that the Petitioner's pre-existing thoracic injury was aggravated by the industrial accident and that decompression surgery on July 1, 2008 was necessitated by the accident. Respondents agreed to continue paying any medical expenses necessitated by the accident. Respondents also agreed to pay temporary total compensation from June 30, 2008 to September 17, 2008 and from October 28, 2008 until the Petitioner became medically stable. The parties agreed that the appropriate compensation weekly rate is $282.00.

The parties also stipulated that there was no treatment necessary at the time for the Petitioner's left knee and left hip, and that all medical expenses had been paid for those claimed injuries to that date. The parties further stipulated that the Petitioner's urology problems were not medically causally related to the industrial accident, and that the Respondents were not liable for the Petitioner's narcotic medications. This stipulation was accepted and approved by the Administrative Law Judge (ALJ) Debbie Hann on January 7, 2009 and Case No. 08-0988 was dismissed.

The Petitioner filed the present adjudication on March 22, 2010, which is assigned Case No. 10-0208, again regarding the industrial accident on May 16, 2007. The Petitioner claims medical expenses, recommended care, temporary total compensation, temporary partial compensation, permanent partial compensation, permanent total compensation, and unpaid interest.

Respondents filed an Answer on April 26, 2010 indicating that they have paid the Petitioner temporary total compensation from June 30, 2008 to June 30, 2009 in the total amount of $13,123.92 and permanent partial compensation for a 12% whole person impairment in the amount of $10,558.08, as well as approximately $14,338.18 in medical expenses. Respondents defend on the grounds that they have paid the Petitioner all claims for which they are liable, and that the Petitioner's continuing medical conditions are not medically causally related to the May 16, 2007 industrial accident. Respondents further argue that the Petitioner is not permanently totally disabled due to the industrial accident.

A hearing was held on January 27, 2011 before Judge Hann. At the hearing the Petitioner withdrew her claim for temporary compensation because it had been paid through March 19, 2010. She indicated that her permanent total compensation claim begins on March 19, 2010, and clarified that her claim for medical expenses includes a September 2010 back surgery and ongoing treatment.

Judge Hann issued Findings of Fact Conclusions of Law and Order on March 10, 2011. Judge Hann concluded that the Petitioner was permanently totally disabled from the May 16, 2007 industrial accident and ordered Respondents to begin paying the Petitioner the subsistence benefits required by statute. Judge Hann also determined that the claimed medical treatment (September 2010 surgery) was necessitated by the industrial accident, and ordered the Respondents to pay those medical expenses.

The Respondents filed a Motion for Review on April 11, 2011. Respondents argued that the Petitioner's surgery was not necessitated by the industrial accident and that the Petitioner was not permanently and totally disabled because of the accident, arguing that she is capable of performing basic work activities and that there are suitable, available jobs that she can perform. Respondents also argued that the case should have been sent to a medical panel. The Petitioner filed an opposing memorandum.

The Appeals Board issued an Order of Remand. Pursuant to that Order, Judge Hann held a second hearing on August 7, 2012 and took additional evidence, including a new medical exhibit which was filed on June 18, 2012 consisting of six volumes and 1,549 pages. The case has now been reassigned to Judge Marlowe, who has reviewed the evidentiary record and completes this adjudication.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legal and Medical Causation

Utah Code Annotated § 34A-2-401 provides that an employee who is injured "by accident arising out of and in the course of the employee's employment" can receive benefits. In Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986), the Utah Supreme Court adopted a two-part test causation analysis. The first component deals with "legal causation" while the second addresses "medical causation."

With regard to medical causation, the Petitioner must show that any conditions for which he claims benefits are medically causally related to an industrial accident. "Under the medical cause test, the claimant must show . . . that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability." Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986). The burden of proof lies with the Petitioner.

The parties have stipulated, and the ALJ concludes, that the Petitioner was injured by accident arising out of and in the course of her employment with the Respondent University of Utah Huntsman Cancer Hospital on May 16, 2007 which resulted in a permanent aggravation of her pre-existing thoracic condition resulting in a decompression and fusion surgery on July 1, 2008.

Scope of Remand

At the August 2, 2012 hearing, the parties disagreed as to the scope of the acceptable evidence to be considered on remand. The Petitioner asserts that the medical cause of the Petitioner's need for the second surgery cannot be addressed on remand because that finding was not disturbed on review. The Respondents assert that the prior findings were set aside so new medical evidence can be considered, which includes Dr. Mattingly's opinion that the there is no medical causal connection between the Petitioner's industrial accident and the need for a second surgery. As a result, the Respondents assert this puts the Petitioner's functional restrictions resulting from her surgeries at issue, because medical causation is at issue.

The Remand Order includes findings of fact, stating, "The Appeals Board finds the following facts to be material to the Hospital's motion for review." The Order then outlines the following facts:

> Ms. Quast suffered from a pre-existing thoracic-spine condition which she permanently aggravated on May 16, 2007, when she slipped and fell while working for the Hospital. To treat her injury, Ms. Quast underwent decompression and fusion surgery on her thoracic spine on July 1, 2008.
>
> Following the surgery, Ms. Quast's mid-back pain persisted and was eventually diagnosed as nonunion of the fused vertebrae in her thoracic spine. In September 2010, Ms. Quast was given work restrictions of no lifting more than 20 pounds or repetitive flexion or extension of her thoracic spine . . . .

None of these facts were inconsistent with the factual findings made in the Findings of Fact, Conclusions of Law and Order was issued on March 10, 2011. Instead, the Commission ruled that there was insufficient evidence in the record after the second surgery to properly evaluate the case, stating "there is no further opinion or information in the record pertaining to Ms. Quast's current status, impairment or activity restrictions after the September 2010 surgery." The Order then states:

> Further information is required regarding Ms. Quast's current condition in order to properly determine whether she is entitled to permanent total disability compensation. The Appeals Board therefore remands the matter to Judge Hann to hold additional proceedings as necessary *to make additional findings pertaining to Ms. Quast's impairment, activity restrictions and any other information regarding her condition following the second surgery."* (Emphasis added.)

There is nothing in the Remand Order which requires reconsideration of the issue of the medical cause of the Petitioner's thoracic spine problems. At the time of the January 27, 2011 hearing, there was medical evidence in the record, specifically Dr. Newton's opinion, that the Petitioner had "no medically verifiable injury that we can easily relate to the industrial events of 5-16-07 . . . it is more likely than not that the T8-9 and T9-10 disc protrusions were incidental findings . . . . So in summary I can only assume that if the patient sustained any injury, it was a contusion of the left hip." But, based upon the prior stipulation, approved by the Commission on January 8, 2009, the parties agreed that the stipulation as to the medical cause of the Petitioner's thoracic spine problems was binding. This was based upon Dr. Moress' evaluation and opinion that the Petitioner suffered a permanent aggravation of her pre-existing thoracic spine problems. The Stipulation states in relevant part:

> The parties agree that the May 16, 2007, industrial accident permanently aggravated Petitioner's preexisting thoracic condition and that the thoracic

> decompression and fusion surgery performed on July 1, 2008, was related to the Industrial accident . . . .

As a result, medical causation was not addressed at the January 27, 2011 hearing even though Dr. Newton's opinion was in conflict with those of Drs. Moress and Patel. The Remand Order does not disturb any of these findings nor does it direct that the medical causation dispute, which existed in the evidentiary record at the time of the hearing, now be addressed.

Dr. Deborah Mattingly's opinion, rendered on April 12, 2012 after the Remand Order was issued, opined the Petitioner suffered a temporary aggravation of her pre-existing back problems because of the industrial accident. Dr. Mattingly disagreed with the medical opinions that the accident caused a permanent aggravation. Dr. Mattingly referenced and agreed with Dr. Newton's opinion on this point. Dr. Mattingly assigned permanent work restrictions of no lifting over 20 pounds, limited bending and alternate sitting, standing and walking as needed. This is consistent with the work restrictions assigned by Drs. Patel and Newton. However, Dr. Mattingly opined that none of these work restrictions were the result of the industrial accident because it did not medically cause the Petitioner's thoracic spine problems that resulted in surgical treatment. But, as outlined above, the medical cause of the Petitioner's thoracic spine problems was not reversed or re-opened in the Remand Order.

The ALJ concludes that the medical cause of the Petitioner's thoracic spine problems exceeds the scope of the Remand Order. Dr. Mattingly's opinion of permanent work restrictions is considered in the analysis below. However, the issue of medical causation of the thoracic spine will not be re-opened or sent to a medical panel.

Permanent Total Disability

The Petitioner's claim for permanent total disability compensation must be evaluated under the standard established by U.C.A. 34A-2-413(1) of the Utah Workers' Compensation Act. Specifically, Sec. 413(1)(b) requires that the Petitioner prove three elements: 1) She has suffered significant impairment as a result of the work accident; 2) She is permanently and totally disabled, as defined by subsection 413(1)(c); and 3) Her work accident is the direct cause of the permanent total disability. These requirements are discussed below.

1. Significant Impairment

A "significant impairment or combination of impairments" under Utah Code § 34A-2-413(1)(b)(i) must be as the result of the industrial accident. In DeMille v. Thurston Cable Construction, Case No. 00-1059 (5/30/03); 2003 UT Wrk. Comp. LEXIS 87, the Commission defined this as "a purely medical condition reflecting any anatomical or

function abnormality or loss." A significant impairment does not have to be demonstrated by an impairment rating. Crafts v. Labor Comm'n, 2005 Utah App. LEXIS 235 (Utah Ct. App. 2005).

The Petitioner's thoracic spine is fused from T7-T12. She is now limited to lifting 20 pounds and must avoid any repetitive flexion or extension of her thoracic spine. The Petitioner's thoracic spine condition has been rated at 22% whole person, of which 12% is due to the May 16, 2007 industrial accident. The ALJ concludes the Petitioner has a significant impairment.

2. Permanent Total Disability

Subsection 413(1)(b)(ii) requiest that the Petitioner prove she is permanently totally disabled according to the four-part definition set out in subsection 413(1)(c)(i) through (iv). Each of the four components of 413(1)(c) are summarized and discussed below.

Gainful employment

Subsection 413 (1)(c)(i) requires a finding that "the employee is not gainfully employed." The Petitioner is not gainfully employed. The Petitioner returned to her job and attempted to work for about 1.5 months after her July 2008 surgery. The Petitioner was unable to physically perform her job duties as a housekeeper for the respondent. The Petitioner's last day worked was two months and 3 weeks prior to her September 7, 2010 surgery which would have been June 17, 2010.

Impairments that limit ability to perform basic work activities

The Commission views the term "basic work activities" as referring to common activities shared in a wide variety of occupational settings, and not to the unique requirements or a particular job. In this sense, the term includes ability to report for work and remain there for a typical day, as well as the degree of flexibility, strength, comprehension, and ability to communicate that is required by the broad range of modern jobs. Thus, this factor should not be judged against either the most strenuous or the most sedentary work, but instead, what may be taken as relatively common requirements in the broad middle range of employment. Chad D. Parkinson v. Chatco, Inc., et al., Case No. 03-0501, Commission Decision issued October 31, 2005.

The ALJ concludes that the Petitioner has a limited ability to do basic work. The Petitioner suffers from a 22% whole person impairment of her thoracic spine which limits her ability to lift more than 20 pounds or to flex or extend her thoracic spine. The Petitioner also has a very limited intellectual functioning. The Petitioner was not able to complete high school even with the assistance of special education. The Petitioner has a

limited ability to read, write, understand math or to learn. The Petitioner also suffers from a developmental disability. The Petitioner received special education and dropped out of high school in the 12th grade.[1] The Petitioner testified she suffers from dyslexia, which causes her to read things upside down or backwards. The Petitioner also suffered from chronic pain and depression prior to the industrial accident. The Petitioner was also born with underdeveloped kidneys and now has only one kidney. The Petitioner had bilateral upper extremity pain which has been surgically treated. She also suffers from migraines. The combination of the Petitioner's physical and intellectual limitations limits her ability to perform basic work activities.

Inability to perform essential functions of past work

Subsection 413(1)(c)(iii) requires that "the industrial . . . impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident . . . ." This requirement focuses only on work-related impairments and their effect on the Petitioner's ability to perform her prior work.

The Petitioner has worked as a housekeeper in hospitals for about 20 years. The Petitioner was required to lift 50-70 pounds, clean bathrooms, wash walls, clean furniture, make and clean beds, sweep and mop floors and dust. Housekeeping in a hospital setting is medium level physical demand work. The Petitioner's work restriction of no lifting over 20 pounds alone takes her out of this category of work. The Petitioner has no other work experience. The ALJ concludes that the Petitioner's thoracic back condition resulting from the May 16, 2007 industrial accident prevents her from performing the essential functions of the basic work activities for which she was qualified to perform at the time of industrial accident.

Ability to do other work

This final part of subsection 413(2)(c) requires the ALJ to consider whether the Petitioner can do other work that is reasonably available to her, taking into account her age, education, past work experience, medical capacity and residual functional capacity.

[1]Although not presented as an exhibit at the hearing, attached to the Petitioner's Application for Hearing is a copy of the February 17, 2010 Notice of Attorney Advisor Decision-Fully Favorable which granted the Petitioner Social Security Disability benefits on the basis of her thoracic spine condition and borderline intellectual functioning. Although Respondents object to the consideration of this piece of evidence because it was not offered nor admitted at the hearing, it was nonetheless an attachment to a pleading and therefore already part of the evidentiary record. This decision notes that psychological testing conducted as part of the Social Security evaluation revealed below average intellectual functioning, including a full scale intelligence quotient score of only 70. This evidence must be addressed in any subsequent proceedings related to re-employment.

The Petitioner is 39 years old and dropped out of high school in 12th grade. The Petitioner was in special education classes in high school and suffers from a learning disability. The Petitioner's work experience is as a hospital housekeeper. As a result of the May 16, 2007 accident, she is restricted to lifting no more than 20 pounds and must avoid any repetitive flexion and extension of her thoracic spine. The Petitioner also has limited intellectual abilities. The Petitioner's work history is unskilled labor. As a result, she does not possess any transferable work skills.

Mike Hyatt, the respondents' vocational expert, believes the Petitioner can perform work as a hotel/motel housekeeper because it meets the light category of work which is the category of work that does not require lifting over 20 pounds.

Working as a hotel/motel housekeeper would require the Petitioner to change linens, strip and make beds, vacuum, clean bathrooms, empty garbage cans and dust. Stripping a bed requires the blanket and cover to be pulled off and the sheets and pillow cases removed. Common sense indicates the following activities also require bending or exertion at the thoracic level: 1) Cleaning bathrooms, including mopping floors, cleaning sinks and counter at waist level; 2) Cleaning over sink mirrors, reaching upward and forward; 3) Cleaning tub/shower combinations (included in most hotel rooms) that requires reaching and bending with the upper body to clean; 4) Cleaning a toilet; 5) Vacuuming carpet with movement of arm and torso.

A hotel/motel housekeeper is required to clean many rooms a day at a quick pace. It is clear that the majority of tasks a hotel/motel housekeeper performs require repetitive extension and flexion of the thoracic spine. The ALJ concludes that the job of hotel/motel housekeeper would require the Petitioner to engage in repetitive flexion and extension of her thoracic spine and exceeds her medical restrictions resulting from the May 16, 2007 industrial accident.

Paul Barnes, the respondent's vocational expert, believes the Petitioner can perform a job at Avalon Health Care, an assisted living home for veterans, as a housekeeper. Mr. Barnes did not know the specific job tasks other than having past experience and being able to read, write and follow oral and written directions. Common sense indicates that an assisted living home would have bedrooms and bathrooms where the residents live that a housekeeper would clean, and that the housekeeping tasks would be the same or similar to that of a hotel/motel housekeeper. Based upon the above findings related to hotel/motel housekeeping, a housekeeper in an assisted living home would require repetitive flexion and extension of the Petitioner's thoracic spine and exceed her work restrictions as the result of the May 16, 2007 industrial accident.

Mr. Barnes also opined that the Petitioner could engage in light assembly work assembling light medical plastics and that job openings exist Optima Consulting and Integra Life Sciences. Critically, Mr. Barnes and Mr. Hyatt were not aware of the specific job

requirements for these jobs and was unable to provide any details as to the physical requirements of these jobs other than meeting the Petitioner's lifting weight limitation. In identifying light housekeeping and light assembly work as other work the Petitioner could perform, Mr. Hyatt agreed that bending and reaching is not always noted in the Dictionary of Occupational Titles, which formed the basis of his opinion. Common sense indicates that generally most assembly work requires rapid reaching and bending of the upper back to assemble parts, either seated or standing at a work station table or an assembly line. Neither Mr. Barnes nor Mr. Hyatt described the jobs they identified as not having this requirement.

The ALJ concludes that the other work identified by the Respondents does not meet the Petitioner's work limitation of having to avoid any repetitive flexion and extension of her thoracic spine. The ALJ therefore concludes that the Petitioner cannot perform other work reasonably available, taking into consideration her age, education, past work experience, medical capacity and residual functional capacity.

3. Work accident as "direct cause" of disability

The Petitioner has very limited intellectual abilities and her work history is dominated by one task: cleaning. Although the Petitioner suffered from many conditions, including depression, chronic pain, including neck and back pain, migraines, incontinence, upper extremity pain and other ailments, she continued to do her work as a hospital housekeeper, classified as medium level physical demand work, until the May 16, 2007 industrial accident. The Petitioner also tried to return to her work as a housekeeper following treatment for her injuries as the result of this accident but was not successful due to her physical limitations following the thoracic fusion surgery. The Petitioner did not have physical restrictions that prevented her from performing her job duties until the May 16, 2007 industrial accident. The ALJ concludes the Petitioner's January 26, 2007 industrial injury is direct cause of the Petitioner's permanent total disability

Summary

The Petitioner is tentatively permanently totally disabled as the result of the May 16, 2007 industrial accident beginning June 18, 2010, when the Petitioner was no longer able to work because of her thoracic spine condition.

Medical Expenses

The Petitioner is entitled to payment of medical expenses related to her September 7, 2010 thoracic surgery to repair the non-union from the prior surgery. There is no dispute that the Petitioner suffered a non-union. Both Dr. Patel and Dr. Newton agree on this point. Although Dr. Newton opined that it was not "an urgency" he has not opined the surgery was not necessary to treat this condition.

ORDER

IT IS THEREFORE ORDERED that the respondents, University of Utah Huntsman Cancer Hospital and Workers Compensation Fund, pay the Petitioner subsistence benefits at the rate of $282.00 per week beginning June 18, 2010 and continuing until further order of the Commission. Those amounts accrued to date are due and payable in a lump sum plus interest at the rate of 8% per annum.

IT IS FURTHER ORDERED that statutory attorneys' fees shall be paid directly to Daniel F. Bertch, according to Utah Code § 34A-1-309 and Utah Administrative Code, Rule 602-2-4. That amount shall be deducted from Petitioner's award and sent directly to Mr. Bertch's office.

IT IS FURTHER ORDERED that the Respondents University of Utah Huntsman Cancer Hospital and Workers' Compensation Fund, pay the Petitioner for necessary medical treatment incurred to treat her thoracic spine condition as the result of the industrial accident, including, but not limited to, the September 7, 2010 surgery, pursuant to the Commission RBRVS fee schedule, plus interest at the rate of 8% per annum.

IT IS FURTHER ORDERED that the Respondents University of Utah Huntsman Cancer Hospital and Workers' Compensation Fund notify the Commission in writing within 45 days of the date of this order whether a re-employment plan shall be submitted. If the respondents elect to submit a re-employment plan within 45 days of the date of this order, the re-employment plan shall be submitted to the Commission within 90 days of the date of this order.

DATED this 31st day of January, 2014

Deidre Marlowe
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for

Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

Rashell Quast vs. University of Utah Huntsman Cancer Hospital and/or Workers Compensation Fund Case No. 10-0208

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER UPON REMAND was mailed on January 31, 2014, to the persons/parties at the following addresses:

Rashell Quast
c/o Daniel F Bertch Esq
dan@bertchrobson.com

Workers Compensation Fund
designated_agent@wcfgroup.com

University of Utah Huntsman Cancer Hospital
c/o Hans Scheffler Esq
hscheffl@wcfgroup.com

Daniel F Bertch Esq
dan@bertchrobson.com

Hans Scheffler Esq
hscheffl@wcfgroup.com

UTAH LABOR COMMISSION
Rosalee Oakeson
Clerk
Adjudication Division

ADDENDUM "C"
Order of The Utah Labor Commission, June 2, 2014.

UTAH LABOR COMMISSION

RASHELL QUAST, Petitioner, vs. UNIVERSITY OF UTAH HUNTSMAN CANCER HOSPITAL and WORKERS COMPENSATION FUND, Respondents.	ORDER ON MOTION FOR REVIEW Case No. 10-0208

University of Utah Huntsman Cancer Hospital and its insurance carrier, Workers Compensation Fund, (collectively referred to as "Huntsman") ask the Utah Labor Commission to review Administrative Law Judge Marlowe's preliminary award of permanent total disability compensation to Rashell Quast under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(4) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUES PRESENTED

Ms. Quast sustained a thoracic-spine injury on May 16, 2007, while she was working for Huntsman. Ms. Quast originally filed a claim for benefits in 2008, case number 08-0988, but the parties resolved that claim by way of a stipulation. Specifically, the parties stipulated that Ms. Quast had a pre-existing thoracic-spine injury that was permanently aggravated by the work accident and that Huntsman was responsible for the cost of surgery in July 2008 to treat the injury.

Ms. Quast then filed another claim for permanent total disability compensation and medical benefits related to the 2007 work accident, which is the subject of the current dispute. She underwent additional surgery in September 2010 to address a nonunion from the 2008 surgery, but her work restrictions and impairment rating were not clearly addressed. Judge Hann held an evidentiary hearing and awarded benefits to Ms. Quast including an award of permanent total disability compensation. Huntsman appealed the award to the Appeals Board, which found that further medical evidence was necessary to determine Ms. Quast's entitlement to benefits and remanded the matter.

On remand, Judge Hann held another evidentiary hearing and took additional medical evidence on Ms. Quast's condition. The matter was then reassigned to Judge Marlowe, who reviewed the evidence and concluded that Ms. Quast was entitled to the cost of the 2010 surgery and

a preliminary award of permanent total disability compensation subject to Huntsman's right to submit a reemployment plan. Huntsman now seeks review of Judge Marlowe's decision by arguing that there are conflicting medical opinions with regard to the necessity of the 2010 surgery and Ms. Quast's work restrictions such that referral to an impartial medical panel is necessary. Huntsman also submits that Ms. Quast has not established entitlement to permanent total disability compensation.

FINDINGS OF FACT

The Commission finds the following facts to be material to Huntsman's motion for review. Ms. Quast was born in 1971. She has a learning disability and dropped out of high school in the 12th grade. Ms. Quast's employment background consists of working as a hospital housekeeper, where she was required occasional heavy lifting, cleaning bathrooms, taking out the trash, washing walls and floors, making beds, cleaning furniture, and dusting. She has a history of urological problems in addition to migraines and chronic back pain. Ms. Quast has suffered various work injuries over the years and has been assessed with different work restrictions as a result; however, there is no indication that she had permanent restrictions as a result of such injuries.

On May 16, 2007, Ms. Quast was working for Huntsman when she slipped on a wet floor and fell to the ground. She underwent decompression and fusion surgery on her thoracic spine performed by Dr. Patel in July 2008. As noted above, the parties entered into a stipulation that Ms. Quast sustained an "injury by accident while in the course and scope of her employment with [Huntsman]." The parties further agreed that the accident "permanently aggravated [Ms. Quast's] pre-existing thoracic condition" and that the 2008 surgery was necessary due to the accident. After she was released to return to work, Ms. Quast worked for about a month before resigning.

Ms. Quast's mid-back pain persisted after the surgery. Dr. Poppen opined in August 2009 that Ms. Quast was "100% disabled" from all of her conditions. In December 2009, Dr. Poppen assessed Ms. Quast with a thoracic disc herniation and myelopathy that required surgery. Dr. Poppen also found that increased pain medication—beyond what Ms. Quast was prescribed before the accident—was necessary due to the 2007 work injury. In early 2010, Dr. Wold evaluated Ms. Quast and recommended physical therapy and gait training for her thoracic-spine condition.

Ms. Quast followed up with Dr. Patel, who ordered a CT scan to diagnose her continued back pain. Dr. Patel diagnosed Ms. Quast with a nonunion in her thoracic spine at the T11 level and unstable hardware installed during the 2008 surgery. Ms. Quast underwent a functional capacity evaluation in August 2010, where she demonstrated the ability to lift twenty pounds and to work in the light physical demand category of jobs. She showed limited range of motion in her thoracic spine, but full functional range of motion throughout her entire spine and she tolerated repetitive forward reaching as well.

In early September 2010, Huntsman's medical consultant, Dr. Newton, acknowledged the possibility of redoing the fusion at T10-11, but opined that such treatment was not urgent. Dr. Newton added that Ms. Quast's limitations were largely self-imposed, but that she should not lift more than 20 pounds and should avoid repetitive flexion or extension of her spine due to the 2007 work injury. Dr. Newton also found that neither medication nor assistive devices were necessary to treat Ms. Quast's work injury. Dr. Patel performed a surgical revision later in September 2010 and confirmed the nonunion and failed hardware diagnosis postoperatively.

Following the 2010 surgery, Dr. Lawrence, who took over for Dr. Patel, opined that Ms. Quast showed significant improvement since the last surgery and was doing well overall despite her complaints of continued back pain. Ms. Quast underwent another functional capacity evaluation in 2012 administered by Ms. Marchant, who concluded that Ms. Quast could lift 20 pounds occasionally and 10 pounds frequently and still demonstrated the capacity for light work. Ms. Marchant also found that Ms. Quast again demonstrated limited motion of her spine, but was then observed exceeding measured motion during the functional tasks. Ms. Marchant noted that Ms. Quast did not give a consistently credible effort during the evaluation and exhibited signs of symptom magnification.

Another of Huntsman's medical consultants, Dr. Mattingly, evaluated Ms. Quast in April 2012. Dr. Mattingly opined that neither the 2008 surgery nor the 2010 revision were medically caused by the 2007 work accident because Ms. Quast sustained only a temporary aggravation of her pre-existing back condition from the accident. Dr. Mattingly assessed Ms. Quast with chronic back pain, generalized anxiety, depression and opiate dependency. Dr. Mattingly recognized that Ms. Quast's ability to work was constrained by her heavy use of pain medication, but concluded Ms. Quast did not have any work restrictions due to the 2007 accident. Dr. Mattingly added that reasonable work restrictions based on Ms. Quast's pre-existing conditions would be no lifting more than 20 pounds, limit bending, and alternate between sitting, standing and walking as needed.

Ms. Quast testified that she has not attempted to find work since the 2008 surgery. Huntsman presented the testimony of two different vocational rehabilitation experts, Mr. Hiatt and Mr. Barnes, who testified that Ms. Quast could return to work as a housekeeper at a hotel or an assisted living facility based on her lifting restriction. Neither Mr. Barnes nor Mr. Hiatt could state whether such positions required repetitive bending or reaching.

DISCUSSION AND CONCLUSION OF LAW

Huntsman raises two main issues in its motion for review: 1) whether it is necessary to refer certain aspects of Ms. Quast's claim to an impartial medical panel; and 2) whether Ms. Quast has established entitlement to permanent total disability compensation. The Commission addresses these issues as follows.

I. Medical Panel Referral

Huntsman contends that there are differing medical opinions with regard to the medical cause of the 2010 surgery, future medical treatment due to the 2007 work accident, and Ms. Quast's work restrictions such that referral to a medical panel is required. The Commission's rule R602-2-2(A) provides that "[a] panel will be utilized…where one or more significant medical issues may be involved. Generally, a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

1) conflicting medical opinions related to causation of the injury;
2) conflicting medical opinions of permanent physical impairment which vary more than 5% of the whole person;
3) conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;
4) conflicting medical opinions related to a claim of permanent total disability; or
5) medical expenses in controversy amounting to more than $10,000."

Necessity of the 2010 Surgery

The parties stipulated that the 2007 accident permanently aggravated Ms. Quast's pre-existing thoracic-spine condition and that the 2008 surgery was due to the work-related injury. The medical evidence shows that the 2010 surgery was to revise the 2008 procedure, the necessity for which was confirmed postoperatively by Dr. Patel. Dr. Newton noted the possibility of a surgical revision and, though he did not believe it to be urgent, did not clearly dispute the necessity of the 2010 surgical revision. Dr. Poppen also described that Ms. Quast required thoracic-spine surgery even after the first procedure had been done.

Dr. Mattingly opined after the fact that neither the 2008 nor the 2010 surgeries were necessary to treat Ms. Quast's work injury. However, Dr. Mattingly's opinion was based on the conclusion that the accident resulted in only a temporary back injury rather than the permanent aggravation to which the parties had already stipulated. Based on the medical evidence provided, the Commission concludes that the 2010 surgery was causally connected to the 2008 procedure. When considering that the parties had already stipulated that the 2008 surgery was related to the work accident, Dr. Mattingly's reasoning on the issue is inapposite and there is no remaining conflict of medical opinions that would warrant referral to a medical panel.

Necessity of Future Medical Care

There are differing medical opinions regarding future medical care necessary to treat Ms. Quast's work-related thoracic-spine injury; however, such conflicting opinions do not require the utilization of a medical panel under the rule. Additionally, there is no indication that the medication, assistive device, or physical therapy expenses which constitute the different recommended treatments

amount to more than $10,000 such that a medical panel must be utilized according to rule.

Dr. Newton found that no further medical care was necessary due to the accident, while Dr. Poppen and Dr. Wold had varying recommendations for future care. After reviewing the various medical opinions on the issue, the Commission is persuaded by Dr. Newton's opinion as it presented a more thorough evaluation of Ms. Quast's condition and explanation as to why no medications or assistive devices were necessary on an industrial basis. Based on the evidence provided, the Commission finds that no future medical care is necessary to treat Ms. Quast's thoracic-spine injury.

Work Restrictions

The last issue that Huntsman argues may require consideration by a medical panel pertains to Ms. Quast's work restrictions. The Appeals Board previously remanded this matter for a better determination of Ms. Quast's work restrictions following the 2010 surgery. The only evidence that clearly addresses Ms. Quast's post-surgery restrictions comes from Dr. Mattingly's evaluation in April 2012.[1] Although Dr. Mattingly opined that Ms. Quast has no restrictions from the work accident, that opinion appears to stem from Dr. Mattingly's conclusion that the work accident resulted in only a temporary injury. Because it has been established that Ms. Quast sustained a permanent thoracic-spine injury from the 2007 accident, Dr. Mattingly's opinion regarding work restrictions, like her opinion on the necessity of the 2010 surgery, is not convincing.

Ms. Quast chose not to supplement the record with evidence related to her work restrictions after the Appeals Board found additional evidence to be necessary. The combination of Ms. Quast's functional capacity evaluation results and Dr. Lawrence's opinion regarding her improvement after the 2010 surgery shows that Ms. Quast is even less limited than Dr. Newton found. Dr. Newton appeared to restrict repetitive flexion or extension of the spine based on the type of surgery that Ms. Quast's underwent; however, she was observed to have full functional range of motion in her spine and to be able to reach without significant difficulty. The Commission finds that the work accident resulted in restrictions of no lifting more than 20 pounds and no repetitive bending of the spine, but that repetitive reaching is permissible. The Commission concludes that referral to a medical panel is not required to determine Ms. Quast's work restrictions or the other medical aspects of her claim.

II. Permanent Total Disability Compensation

Section 34A-2-413(1)(b) of the Utah Workers' Compensation Act provides that, in order to establish entitlement to permanent total disability compensation, an injured employee must show:

(i) The employee sustained a significant impairment or combination of impairments as

[1] Dr. Knippa also performed a psychological evaluation of Ms. Quast following the 2010 surgery, but such evaluation did not address Ms. Quast's work restrictions except to find that her psychological condition and drug use limited her to performing unskilled labor.

a result of the industrial accident...that gives rise to the permanent total disability entitlement;

(ii) The employee is permanently and totally disabled; and

(iii) The industrial accident...is the direct cause of the employee's permanent total disability.

Significant Impairment

Huntsman argues that Ms. Quast did not sustain a significant impairment from the 2007 accident essentially because she retains much of the same functional ability she had before the accident. The evidence shows that the work accident resulted in a thoracic-spine impairment that limits Ms. Quast from lifting more than 20 pounds and from repetitive bending of the spine. Nearly all of Ms. Quast's past work involved housekeeping tasks in a hospital setting, at least some of which she can no longer perform because of her impaired lifting ability. The medical evidence shows that Ms. Quast does retain most of her functional ability from before the accident; but her work-related spine impairment impacts her ability to do at least some of the work she has done for her entire career. The Commission therefore concludes that Ms. Quast's work-related spine impairment is significant. Ms. Quast has met §413(1)(b)(i).

Permanent Total Disability

Subsection 34A-2-413(1)(b)(ii) requires Ms. Quast to demonstrate that she is permanently and totally disabled according to the requirements of §34A-2-413(1)(c). It is Ms. Quast's burden to prove each of the following:

(i) The employee is not gainfully employed;

(ii) The employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) The industrial impairment or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident...that is the basis for the employee's permanent total disability claim; and

(iv) The employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

Ms. Quast is not gainfully employed. With respect to the next element, §413(1)(c)(ii), the Commission has consistently interpreted the term "basic work activities" as common factors generally required in a wide variety of employment settings. These factors include the ability to report for work on a regular basis and remain at work through the day, as well as a reasonable degree of flexibility, strength, endurance, mental capacity and ability to communicate. The impairment in

question need not be related to the work accident. Ms. Quast suffers from various conditions that affect her ability to function, including a learning disorder, urological problems, migraines, and thoracic-spine problems. However, she was able to work for many years with her pre-existing conditions, which leads the Commission to conclude that such conditions do not reasonably limit her ability to do basic work activities. With respect to Ms. Quast's thoracic-spine condition, the results of the functional capacity evaluation are particularly helpful. During the first evaluations, Ms. Quast tolerated repetitive reaching and demonstrated full functional range of motion in her entire spine. Since that evaluation, Dr. Lawrence, noted "significant improvement" in Ms. Quast's condition after the revision surgery. Ms. Quast's ability to lift 20 pounds and her difficulty only with repetitive bending of her spine show that she still has a reasonable degree of strength and flexibility. The record also shows Ms. Quast can work in the light physical demand category of jobs, and there is no indication of any limitation in her ability to communicate, report for work, or remain at work through the day. Based on the evidence presented, the Commission finds Ms. Quast has not shown that her impairments limit her ability to do basic work activities.

Although Ms. Quast has not met §413(1)(c)(ii), the Commission will consider the remaining elements of §413(1) in the interest of completeness. The next element requires Ms. Quast to show that her work-related thoracic-spine problems prevent her from performing the essential functions of the work activities for which she has been qualified until the 2007 work accident. As already discussed, Ms. Quast's work injury limits her ability to lift heavy objects and her duties as a hospital housekeeper required her to do some heavy lifting. There is no indication in the record as to how often Ms. Quast's work as a hospital housekeeper required bending of her spine, but her impaired lifting ability precludes her from returning to the work for which she was qualified until the time of the accident. Ms. Quast meets §413(1)(c)(iii).

The final element of §413(1)(c) requires Ms. Quast to show that she cannot perform other work reasonably available considering her age, education, past work experience, medical capacity, and residual functional capacity. Ms. Quast returned to work for about a month after the 2008 surgery, but has not attempted to find another job since then. The Commission notes, however, that her treating physician, Dr. Poppen, found her to be "100% disabled," which explains why she would not look for work. Ms. Quast is relatively young and has years of experience in housekeeping tasks, but also has limited intellectual capacity and education.

The main reason why Ms. Quast claims to be unable to work is her thoracic-spine condition; however, such condition leaves her with good functional capacity as she can still lift up to 20 pounds and need only avoid repetitive bending of the spine. Huntsman's vocational rehabilitation experts testified that Ms. Quast could perform the duties of a housekeeper at a hotel or an assisted living facility. However, the experts' opinion was based primarily on Ms. Quast's ability to lift 20 pounds and did not sufficiently address her restriction against repetitive bending of the spine. Certainly different housekeeping jobs entail different amounts of required bending and it may be that there exists a housekeeping job that Ms. Quast can perform with her restrictions. However, the failure by Huntsman's vocational experts to offer any information regarding such bending requirements leads

the Commission to find that Huntsman did not meet its burden of showing that there is other work reasonably available to Ms. Quast.

Direct Cause

As Ms. Quast has not established that she is permanently and totally disabled, the Commission cannot conclude that the 2007 work accident was the direct cause of such disability. While the record supports Ms. Quast's assertion that she cannot return to work for Huntsman in the same capacity as when the accident occurred, the ability to return to a previous position is not the only criterion for establishing that the work accident directly caused an injured worker's disability. Rather, Ms. Quast must show that she is permanently and totally unable to work because of the accident directly. Ms. Quast injured her back and underwent surgery on her spine due to the work accident, but she has not demonstrated that she is permanently and totally unable to work simply because she cannot return to her previous job. The medical evidence shows Ms. Quast retains a level of functionality even after the surgery that allows her to work.

Should Ms. Quast's work-related spine condition deteriorate such that a significant change in circumstances occurs, she may be eligible for permanent total disability compensation at some future date. As the evidence stands now, however, Ms. Quast has not shown that she is entitled to permanent total disability compensation. The Commission therefore disagrees with Judge Marlowe's decision regarding permanent total disability and denies Ms. Quast's claim for such compensation.

ORDER

The Commission sets aside the portion of Judge Marlowe's decision of January 31, 2014, awarding subsistence benefits to Ms. Quast for her claim of permanent total disability compensation and denies her claim for such benefits. The Commission affirms the remaining portions of Judge Marlowe's decision.

Dated this 30th day of May, 2014.

Sherrie Hayashi
Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order on Motion for Review in the matter of Rashell Quast, Case No. 10-0208, was mailed first class postage prepaid this 30th day of May, 2014, to the following:

Rashell Quast
3831 S Hummingbird
Salt Lake City UT 84123

University of Utah Huntsman Cancer Hospital
2000 Circle of Hope
Salt Lake City UT 84112

Workers Compensation Fund
Dennis V. Lloyd Designated Agent
100 W Towne Ridge Pkwy
Sandy UT 84070

Daniel F. Bertch, Esq.
1996 E 6400 S Ste 100
Salt Lake City UT 84121

Hans Scheffler, Esq.
Workers Compensation Fund Legal Dept.
100 W Towne Ridge Pkwy
Sandy UT 84070

Sara Danielson
Utah Labor Commission

ADDENDUM "E"
20 C.F.R. 404.1520.

§ 404.1521. What we mean by an impairment(s) that is not severe.

Code Of Federal Regulations

Title 20. Employees' Benefits

Chapter III. SOCIAL SECURITY ADMINISTRATION

Part 404. FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

Subpart P. DETERMINING DISABILITY AND BLINDNESS

EVALUATION OF DISABILITY

Current through August 31, 2013

§ 404.1521. What we mean by an impairment(s) that is not severe

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include-

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, co-workers and usual work situations; and

(6) Dealing with changes in a routine work setting.

Cite as 20 CFR 404.1521

History. 50 FR 8728, Mar. 5, 1985

ADDENDUM "D"
SSR 85-28.

Disability Insurance

(PPS-122)

SSR 85-28

SSR 85-28: TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To clarify the policy for determining when a person's impairment(s) may be found "not severe" and, thus, the basis for a finding of "not disabled" in the sequential evaluation of disability, and thereby reflect certain circuit court decisions that have taken issue with the Secretary's previously stated definition of "not severe" impairments.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended; Regulations No. 4, sections 404.1520-404.1523 and Regulations No. 16, sections 416.920-416.923.

PERTINENT HISTORY: The basic definition of disability is contained in sections 223(d)(1)(A) and 1514(a)(3)(A) of the Act. Under this definition, an individual must have, as an initial requirement, a "physical or mental impairment," as defined in sections 223(d)(3) and 1614(a)(3)(C), and which is expected either to result in death or to last at least 12 months. The principal requirement regarding impairment severity contained in the basic statutory definition of disability is that the individual's inability to engage in any substantial gainful activity (SGA) be "by reason of" the impairment.

In reporting on the Social Security Amendments of 1954 which first introduced the basic definition of disability into the Act, the Senate Committee on Finance indicated that the definition required that there be a "medically determinable *impairment of serious proportions*," that is, "of a nature and degree of severity sufficient to justify its consideration as the cause of failure to obtain any substantial gainful work."

In the Social Security Amendments of 1967, Congress introduced into the Act the provision in section 223(d)(2)(A) which sets out a specific requirement respecting impairment severity and which provides for the consideration of vocational factors in determining disability: An individual ". . . shall be determined to be under a disability only if his *physical or mental impairment or impairments are of such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work

experience, engage in any kind of substantial gainful work which exists in the national economy . . ." (emphasis added). In reporting on these amendments, both the Senate Committee on Finance and the House Committee on Ways and Means reaffirmed the need for some assurance that a finding of disability would be based on a *serious impairment*. The Committees explained that the provisions of the amendment would require, in part, that:

> ". . . an individual would be disabled *only if it is shown that he has a severe medically determinable physical or mental impairment or impairments* . . ." (emphasis added).

As in 1954 and 1967, Congress, again, in the Social Security Disability Benefits Reform Act of 1984, made it clear that a denial of disability benefits may be based on medical factors alone. In amending section 223(d)(2) and section 1614(a)(3) of the Act to provide for the evaluation of the impact of multiple impairments throughout the sequential evaluation process, Congress introduced language which affirms the presence of a severity threshold in the adjudicative process:

> "In determining whether an individual's physical or mental impairment or impairments are *of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section*, the Secretary shall consider the combined effect of all of the individual's impairments. . . ."

The validity of a disability decision based on medical considerations alone was also recognized in the Conferees' discussion of the amendment (House of Representatives Conference Report 98-1039 to accompany H.R. 3755. September 19, 1984, p. 30) in which it was stated that there was no intention to "either eliminate or impair" the use of the "current sequential evaluation process."

The principal that a denial determination may be made on the basis of medical considerations alone was first reflected in Regulations No. 4, section 404.1502(a), published in 1960. Regulations published in 1978 revised the 1960 statement concerning such determinations by replacing the phrase ". . . the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities . . ." with ". . . the medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

This change in regulatory definition was introduced in the language describing step 2 of the sequential evaluation process which was formalized in regulations effective February 26, 1979. (The 1980 recodification of the Disability Regulations into common sense language reworded the definition of a not severe impairment as follows: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities." 20 C.F.R. 404.1521(a) and 416.921(a). Also see sections 404.1520(c) and 416.920(c).) These changes in regulatory language were *not* intended to alter the levels of severity for a finding of not disabled on the basis of medical considerations alone. Rather, they were

intended only to clarify the circumstances under which such a finding would be justified (*Federal Register* -- March 7, 1978, p. 9296-9297; November 28, 1978, p. 55357-55358). Nevertheless, some recent circuit court decisions have taken exception to the threshold of impairment severity applied in the adjudication of subject cases which were denied on the basis of not severe impairment.

As observed by the Congress, the Social Security Administration (SSA), as part of an ongoing review, is reevaluating the application of the not severe impairment policy and will continue to do so. This ruling is part of the ongoing reevaluation and interprets and clarifies the current policy on not severe impairment, describes the threshold intended, and reflects recent legislation. Also, it is being issued to clarify that SSA's policy is consistent with various court decisions. For example, *Stone* v. *Heckler*, 752 F.2d 1099 (5th Cir. 1985), and *Estran* v. *Heckler*, 745 F.2d 340 (5th Circ. 1984), stated that "an impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work irrespective of age, education, or work experience." As *Baeder* v. *Heckler*, No. 84-5663 (3rd Cir. July 24, 1985), suggested, the severity regulation is to do no "more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working."

POLICY CLARIFICATION: In determining, for initial entitlement to benefits, whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, ability to do past work, and ability to do other work (in light of the individual's age, education and work experience) are considered, in that **order. See 20 CFR** sections 404.1520 and 416.920. In determining continuing entitlement to benefits, the adjudicator, with appropriate consideration of the medical improvement review standard, also follows a sequential evaluation process which includes the "not severe impairment" concept. Fundamental to these processes is the statutory requirement that to be found disabled, an individual must have a medically determinable impairment "of such severity" that it precludes his or her engaging in any substantial gainful work.

As explained in 20 CFR, sections 404.1520, 404.1521, 416.920(c), and 416.921, at the second step of sequential evaluation it must be determined whether medical evidence establishes an impairment or combination of impairments "of such severity" as to be the basis of a finding of inability to engage in any SGA. An impairment or combination of impairments is found "not severe" and a finding of "not disabled" is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities). Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be not severe would not prevent him or her from engaging in SGA.

The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs. Examples of these are walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgment, responding appropriately to supervision, coworkers, and usual work situations; and dealing with changes in a routine work setting. Thus, these basic work factors are inherent in making a determination that an individual does not have a severe medical impairment.

Although an impairment is not severe if it has no more than a minimal effect on an individual's physical or mental ability(ies) to do basic work activities, the possibility of several such impairments combining to produce a severe impairment must be considered. Under 20 CFR, sections 404.1523 and 416.923, when assessing the severity of whatever impairments an individual may have, the adjudicator must assess the impact of the combination of those impairments on the person's ability to function, rather than assess separately the contribution of each impairment existed alone. A claim may be denied at step two only if the evidence shows that the individual's impairments, when considered in combination, are not medically severe, i.e., do not have more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities. If such a finding is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.

Inherent in a finding of a medically not severe impairment or combination of impairments is the conclusion that the individual's ability to engage in SGA is not serious affected. Before this conclusion can be reached, however, an evaluation of the effects of the impairment(s) on the person's ability to do basic work activities must be made. A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities; thus, an assessment of function is inherent in the medial evaluation process itself. At the second step of sequential evaluation, then, medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities. If this assessment shows the individual to have the physical and mental ability(ies) necessary to perform such activities, no evaluation of past work (or of age, education, work experience) is needed. Rather, it is reasonable to conclude, based on the minimal impact of the impairment(s), that the individual is capable of engaging in SGA.

By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work. If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate. The inability to perform past relevant

work in such instances warrants further evaluation of the individual's ability to do other work considering age, education and work experience.[1]

Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued. In such a circumstance, if the impairment does not meet or equal the severity level of the relevant medical listing, sequential evaluation requires that the adjudicator evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience.

EFFECTIVE DATE: On publication.

CROSS-REFERENCES: Program Operations Manual System, sections DI 00401.390-DI 00401.410; DI A00401.390-DI A00401.410.

---

[1] This provision does not conflict with, nor negate, the policy stated in SSR 82-63 concerning special "no recent or relevant work experience" cases. In such cases an individual must be found to have a severe impairment(s) (i.e., one which has more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities) in order to be considered under the special provision of that Ruling.

Back to Table of Contents

KeyCite Yellow Flag - Negative Treatment
Certiorari Granted by Quast v. Labor Com'n, Utah, December 11, 2015

362 P.3d 292
Court of Appeals of Utah.

Rashell **QUAST**, Petitioner,
v.
LABOR COMMISSION, University of Utah Huntsman Cancer Hospital, and Workers Compensation Fund, Respondents.

No. 20140559–CA.
|
Nov. 12, 2015.

Synopsis
Background: Workers' compensation claimant sought judicial review of the Labor Commission's denial of her claim for permanent total disability compensation.

[Holding:] The Court of Appeals, Christiansen, J., held that claimant established that she could not perform basic work activities without some limitation, thus satisfying the limited-ability requirement for permanent total disability compensation.

So ordered.

West Headnotes (6)

[1] **Workers' Compensation**
⇐ Amount and period of compensation

Appellate courts review the Labor Commission's ultimate finding as to whether workers' compensation claimant seeking permanent total disability has a limited ability to perform basic work activities deferentially, reversing only if the finding is not supported by substantial evidence. West's U.C.A. § 34A–2–413(1)(c).

Cases that cite this headnote

[2] **Workers' Compensation**
⇐ In general; questions of law or fact

Whether the Labor Commission applied the correct legal standard in making its determination is a question of law, and appellate courts review the legal standard applied by the Commission for correctness in workers' compensation case.

Cases that cite this headnote

[3] **Workers' Compensation**
⇐ Incapacity for Work or Employment

To satisfy the limited-ability element of a permanent total disability claim, the workers' compensation claimant need not prove a complete inability to perform basic work activities, but only that the claimant's ability to perform these activities is limited. West's U.C.A. § 34A–2–413(1)(c).

1 Cases that cite this headnote

[4] **Workers' Compensation**
⇐ Particular cases in general

When making permanent total disability determination, Labor Commission should have focused on whether workers' compensation claimant's disabilities negatively affected her ability to perform the basic work activities commonly required in employment and not on whether her disabilities "reasonably" limited her ability to perform basic work activities; claimant needed only to establish that her ability to perform basic work activities was limited, not that her limitations were reasonable. 20 C.F.R. § 404.1521(b)(1); West's U.C.A. § 34A–2–413.

1 Cases that cite this headnote

[5] **Workers' Compensation**
⇐ Particular cases in general

Workers' compensation claimant established that she could not perform basic work activities without some limitation, thus satisfying the limited-ability requirement for permanent total disability compensation; claimant's thoracic-

spine injury limited her physical functions involving lifting items over 20 pounds and bending her spine, claimant's work-related spine impairment impacted her ability to do at least some of the work she had done for her entire career, and her impaired lifting ability precluded claimant from returning to the work for which she was qualified at the time of the accident. 20 C.F.R. § 404.1521(b)(1); West's U.C.A. § 34A–2–413(1)(c)(ii).

Cases that cite this headnote

[6] **Workers' Compensation**
⇐ Incapacity for Work or Employment

Workers' compensation claimant, seeking permanent total disability, need only demonstrate that her ability to perform basic work activities is limited, not that her limitations are reasonable or complete. West's U.C.A. § 34A–2–413(1)(c).

1 Cases that cite this headnote

Attorneys and Law Firms

*293 Daniel F. Bertch and Kevin K. Robson, Salt Lake City, for Petitioner.

Hans M. Scheffler, for Respondents University of Utah Huntsman Cancer Hospital and Workers Compensation Fund.

Judge MICHELE M. CHRISTIANSEN authored this Memorandum Decision, in which Judges J. FREDERIC VOROS JR. and KATE A. TOOMEY concurred.

Memorandum Decision

CHRISTIANSEN, Judge:

¶ 1 Rashell **Quast** seeks judicial review of the Labor Commission's denial of her claim for permanent total disability compensation. We set aside the Commission's decision.

¶ 2 **Quast** was injured in 2007 while working at the University of Utah Huntsman Cancer Hospital when she slipped and fell on a wet floor. At the time of the accident, she had a preexisting back injury and other medical conditions. The accident permanently aggravated her preexisting back injury, and she underwent spine surgery in 2008 and in *294 2010. **Quast** has not worked since shortly after her 2008 surgery.

¶ 3 **Quast** filed a claim for permanent total disability (PTD) compensation related to her 2007 accident. After an evidentiary hearing, the administrative law judge (the ALJ) awarded **Quast** PTD compensation. On review, the Commission vacated that decision and ordered a new hearing to take additional medical evidence related to **Quast's** work restrictions. After the second hearing, the ALJ again awarded **Quast** PTD compensation. On review, the Commission again reversed the award of PTD compensation.

¶ 4 The Commission found that "**Quast** suffers from various conditions that affect her ability to function." The Commission also found that **Quast's** thoracic-spine impairment "limits [**Quast**] from lifting more than 20 pounds and from repetitive bending of the spine." The Commission nevertheless concluded that **Quast** had failed to show that her impairments limit her ability to do basic work activities. The Commission explained that **Quast's** preexisting conditions "do not reasonably limit her ability to do basic work activities" and that, in spite of the physical limitations from her thoracic-spine impairments, "she still has a reasonable degree of strength and flexibility." The Commission therefore denied **Quast's** claim for PTD compensation. **Quast** petitioned this court for judicial review of the Commission's decision.

[1] [2] ¶ 5 **Quast** argues that the Commission erred in determining that she was not limited in performing basic work activities. We review the Commission's "ultimate finding," as to whether a claimant has a limited ability to perform basic work activities, deferentially, reversing only if the finding is not supported by substantial evidence. *Provo City v. Labor Comm'n,* 2015 UT 32, ¶¶ 12–13, 345 P.3d 1242. But whether the Commission applied the correct legal standard in making its determination is a question of law, and we review the legal standard applied by the Commission for correctness. *A & B Mech. Contractors v. Labor Comm'n,* 2013 UT App 230, ¶ 15, 311 P.3d 528.

¶ 6 **Quast** argues that the Commission's finding that she was not limited in her ability to perform basic work activities

misinterprets the statutory language of Utah Code section 34A–2–413. To demonstrate a permanent total disability, a claimant must demonstrate, among other things, that she has "an impairment or combination of impairments that limit the [claimaint's] ability to do basic work activities." Utah Code Ann. § 34A–2–413(1)(c) (LexisNexis Supp. 2014). **Quast** argues that "limit" in this context means only "that the medical impairment places a limitation on work ability" and that her thoracic-spine injury "has placed a significant limit on her ability to do [basic work activities]"—i.e., bending and lifting.

[3] ¶ 7 To satisfy the limited-ability element of a PTD claim, the claimant "need not prove a complete inability to perform basic work activities, [but] only that the [claimant's] ability to perform these activities is limited." *Provo City,* 2015 UT 32, ¶ 28, 345 P.3d 1242. Because "basic work activities" are those " 'abilities and aptitudes necessary to do most jobs,' " the claimant's impairments "must limit [the claimaint's] ability to perform the work activities of a broad spectrum of jobs available." *Id.* (quoting 20 C.F.R. § 404.1521(b) (2008)). In *Provo City,* the Utah Supreme Court upheld the Commission's decision to award PTD compensation to a former facility service technician because the evidence presented to the Commission was sufficient to establish that the claimant's impairments "negatively affect[ed] his ability to perform" even in "more sedentary" and "less physically demanding jobs, such as office work." *Id.* ¶¶ 29–30. In other words, there was substantial evidence from which the Commission could find that the claimant's injury "limited his ability to perform basic work activities that would be required for most jobs." *Id.* ¶ 30.

¶ 8 Recently, this court decided *Oliver v. Labor Commission,* 2015 UT App 225, wherein we explained the scope of the inquiry required of the Commission in evaluating whether an impairment limits a claimant's ability to perform basic work activities:

> [T]he Workers' Compensation Act does not direct the Commission to determine whether the claimant has reasonable levels of functionality or a reasonable ability to ***295** perform basic work activities. Rather, it requires the Commission to consider whether a claimant's "ability to perform these activities is limited." Thus, *evaluating whether a claimant retains a reasonable degree of physical and mental functionality notwithstanding a disability has no place in this analysis* because the basic-work-activities analysis begins and ends with evaluating whether the claimant's disability "negatively affects" the ability to perform the basic work activities commonly required in employment.

Id. ¶ 11 (citations omitted) (emphasis added).

[4] ¶ 9 Our analysis in *Oliver* is dispositive here. The Commission found that "**Quast** suffers from various conditions that affect her ability to function" and that **Quast's** thoracic-spine impairment "limits [her] from lifting more than 20 pounds and from repetitive bending of the spine." Moreover, it found that **Quast** was limited to the "light physical demand category of jobs." In accordance with *Oliver,* the Commission should have focused only on whether these disabilities "negatively affect[ ] [**Quast's**] ability to perform the basic work activities commonly required in employment." *See id.* (citation and internal quotation marks omitted); *see also* 20 C.F.R. § 404.1521(b)(1) (2008) (giving as examples of basic work activities "[p]hysical functions such as ... lifting, pushing, pulling, reaching, carrying or handling"). There is no qualitative restriction before a finding of "limited" can be made.

[5] ¶ 10 The Commission's conclusion that **Quast's** post–2007 disabilities did not "reasonably" limit her ability to perform basic work activities because she retained "good functional capacity" are inconsistent with the statutory language, our supreme court's guidance in *Provo City,* and our recent decision in *Oliver.* **Quast** need only demonstrate that her ability to perform basic work activities is limited, not that such a limitation is "reasonable." *See Provo City,* 2015 UT 32, ¶ 28, 345 P.3d 1242; *Oliver,* 2015 UT App 225, ¶ 11, 359 P.3d 684 (observing that the Commission's use of the qualifying term "reasonable" imposed a higher burden on the claimant than that dictated by statute and that the Commission therefore misconstrued the governing legal standard). The Commission's findings demonstrate that **Quast's** thoracic-spine injury limits her physical functions involving lifting items over twenty pounds and bending her spine. *See* 20 C.F.R. § 404.1521(b)(1). And the findings demonstrate that **Quast's** "work-related spine impairment impacts her ability to do at least some of the work she has done for her entire career" and that "her impaired lifting ability precludes [**Quast**] from returning to the work for which she was qualified at the time of the accident." Moreover, the Commission determined that while there may be some housekeeping work that **Quast** can perform despite her restrictions against repetitive bending of the spine, her employer failed to prove that there was other work reasonably available to **Quast**.

[6] ¶ 11 To prove her entitlement to permanent total disability compensation, **Quast** need only establish that her "ability to perform [basic work] activities is limited," not that her limitations are "reasonable" or "complete." Here, the evidence indicates that **Quast** cannot perform basic work activities without some limitation, thus satisfying the limited-ability requirement for PTD compensation under section 34A–2–413(1)(c)(ii) of the Utah Code. The Commission's contrary determinations as to whether **Quast** was limited in her ability to do basic work activities were based on an incorrect legal standard. We therefore set aside the Commission's ruling and allow the ALJ's order to stand.

All Citations

362 P.3d 292, 2015 UT App 267

End of Document